

EDITOR'S NOTE

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85-1563-CSY
atus: GRANTED

Title: California, Petitioner
V.
Albert Greenwood Brown, Jr.

cketed:
rch 22, 1986

Court: Supreme Court of California
Counsel for petitioner: bloom, Jay Michael
Counsel for respondent: Knox, Monica

try	Date	Note	Proceedings and Orders
1	Mar 22 1986	G	Petition for writ of certiorari filed.
2	Mar 22 1986		Appendix of petitioner California filed.
3	Apr 18 1986		Brief of respondent Albert Greenwood Brown, Jr. in opposition filed.
3	Mar 13 1986		Application for stay filed.
4	Mar 14 1986		Response requested. Due March 20, 1986 at noon.
5	Mar 19 1986		Response filed.
5	Mar 27 1986		Application for stay granted by Rehnquist, J., with in-chambers opinion.
7	Apr 4 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Apr 18 1986		* Corrected IFP affidavit in route.
9	Apr 23 1986		DISTRIBUTED. May 15, 1986.
3	May 16 1986		REDISTRIBUTED. May 22, 1986.
1	May 23 1986		REDISTRIBUTED. May 29, 1986.
2	Jun 2 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
3	Jun 2 1986		The petition for writ of certiorari is granted limited to Question 1 presented by the petition. *****
4	Jun 17 1986	G	Motion of respondent for appointment of counsel filed.
5	Jun 30 1986		Motion for appointment of counsel GRANTED and it is ordered that Monica Knox, Esq., of San Francisco, California, is appointed to serve as counsel for the respondent in this case.
5	Jul 14 1986		Joint appendix filed.
7	Jul 14 1986		Brief of petitioner California filed.
5	Jul 16 1986		Brief amicus curiae of Criminal Justice Legal Foundation filed.
3	Aug 1 1986		Order extending time to file brief of respondent on the merits until September 5, 1986.
1	Aug 6 1986		Record filed.
2	Aug 6 1986		Certified copy of original record, 2 boxes, received.
3	Sep 5 1986		Brief amicus curiae of ACLU, et al. filed.
4	Sep 5 1986		Brief of respondent filed.
5	Oct 6 1986		SET FOR ARGUMENT. Tuesday, December 2, 1986. (3rd case) (1 hour).
5	Oct 10 1986		CIRCULATED.
7	Nov 20 1986	X	Reply brief of petitioner California filed.
5	Dec 2 1986		ARGUED.

85-1553

Supreme Court, U.S.

FILED

MAR 22 1986

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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i.

QUESTIONS PRESENTED

1. Whether an instruction at the penalty phase of a death penalty trial not to be swayed by mere sympathy, passion, prejudice, public opinion, or public feeling violates the Eighth Amendment where the defendant has been permitted an unlimited opportunity to present mitigating evidence and the instruction merely advised the trier of fact not to consider matters not relevant to the offense or the offender.

2. Whether the Eighth Amendment requires that a trier of fact be given discretion not to impose the death penalty because it believes the penalty is inappropriate even though it has found aggravating factors outweigh mitigating factors when state law mandates the trier

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ii.

of fact shall return a punishment of death when it determines the aggravating factors outweigh the mitigating factors.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California,
respectfully prays that a writ of cer-
tiorari be issued to review the judgment
and opinion of the Supreme Court of the
State of California affirming the convic-
tion and special circumstance, but

reversing the penalty of death, entered on December 5, 1985. A petition for rehearing was denied on January 30, 1986, and the opinion was ordered modified. The remittitur was issued on January 30, 1986.

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the penalty of death (People v. Brown (1985) 40 Cal.3d 488) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing and modifying the opinion appears as Appendix B of this petition.

JURISDICTION

The judgment of the California Supreme Court was filed on December 5, 1985. A timely petition for rehearing

was denied on January 30, 1986. This petition is filed within 60 days of that date and therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED

1. United States Constitution,
Amendments Eight and Fourteen.

STATEMENT OF THE CASE

By an amended information filed on October 15, 1981, the District Attorney of Riverside County charged respondent in count I with murder, in violation of Penal Code section 187. It was further alleged the murder was committed while respondent was engaged in the commission of the crime of rape within the meaning of Penal Code section 190.2, subdivision (a)(17)(iii). Respondent was also charged in count II with rape, in violation of

Penal Code section 261, subdivisions 2 and 3. It was further alleged he inflicted great bodily injury within the meaning of Penal Code section 12022.8. Additionally, it was alleged he suffered two prior felony convictions. (CT 1-3.)^{1/} Respondent pled not guilty and denied the special allegations. (CT 25, 82.)

Trial by jury commenced (CT 105) and on February 4, 1982, the jury found appellant guilty of first-degree murder and forcible rape as charged in the information. (CT 194-195.) The jury specifically found the murder was done with express malice aforethought, premeditation and deliberation. (CT 196.)

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1. The designation "CT" refers to the Clerks Transcript. The designation "RT" refers to the Reporter's Transcript.

The great bodily injury allegation was found to be true. (CT 197.) The jury further found a special circumstances allegation (Pen. Code, § 190.2, subd. (a)(17) (iii) to be true. (CT 198.) On February 19, 1982, the jury fixed the penalty on count I as death. (CT 314.) The court imposed the death penalty on count I. As to count II, respondent was sentenced to state prison for the upper term of eight years with a five-year enhancement for a great bodily injury allegation plus a five-year enhancement for the first prior, the term on count II to run consecutively to count I but stayed pending appeal on count I. (CT 324, 335-337.)

On an automatic appeal to the California Supreme Court, the judgment of

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guilt and a finding of a special circumstance was affirmed. The penalty judgment was reversed.

STATEMENT OF FACTS

A. Guilt Phase

On October 28, 1980, at approximately 7:30 a.m., 15 year-old Susan Jordan and her minor sister (Karen) and brother (James) left their house located at 9946 Victoria Avenue in Riverside. (16 RT 4079-4082, 4090.)

Angelina Jordan, Susan's mother, called home from work at about 3 p.m. that day to check on Susan and the other children. Karen answered the telephone and told Mrs. Jordan that Susan had not come home. (16 RT 4094-4095.) Mrs. Jordan drove to the Arlington High School and looked for Susan.^{2/} She could

2. It was later determined Susan did not attend school that day. (21 RT 5211.)

not locate her so she drove home. Susan was not at home. (16 RT 4097-4100.) Mrs. Jordan became concerned and began checking around the neighborhood for Susan. (16 RT 4100-4104.)

Mrs. Jordan returned home and at about 7 p.m. the telephone rang. Mrs. Jordan answered it and a male voice said, "Hello, Mrs. Jordan. Susie isn't home from school yet, is she?" Mrs. Jordan replied, "No, she isn't." The male voice then said, "You will never see your daughter again. You can find her body on the corner of Victoria and Gibson." She asked the caller to repeat it and he did. She pleaded with him not to hang up, but he did. (16 RT 4105-4106.) Mrs. Jordan subsequently called police. (16 RT 4107.)

At 7:31 p.m. a telephone call was received at the Riverside Police

Department. A male caller said, "On the corner of Gibson and Victoria, fifth row, you will find a white Caucasian body of a young girl in the orange grove." Thereafter, the caller hung up. (19 RT 4650-4653.)

Police officers were sent to the orange grove. A search of the orange grove commenced but did not turn up anything. (19 RT 4608, 4657-4659, 4660.) Mrs. Jordan later informed a police officer of the anonymous phone call she had received earlier that evening. Shortly thereafter the telephone rang and the officer answered it. (19 RT 4612.) A male voice said, "Is this the Jordan house or the Jordan residence?" He replied, "Yes." The male caller then said, "You can find Sue's identification in a telephone booth at the Texaco station at Arlington and Indiana." (19 RT

4613.) The caller then hung up. (19 RT 4614.)

Officer Taulli later arrived at the orange grove and a dog named Nikky sniffed Susan's clothing. Nikky began to search the grove. (19 RT 4662.) Shortly thereafter, Nikky led police to a pair of torn panties inside the grove. Nikky then went down to the next six rows where Susan's body was found. Susan's body was face down and dirt was piled up on each side of her head. Police secured the area (19 RT 4665-4669) and homicide detectives were called to the scene. (19 RT 4663-4664, 4673-4674, 4689.) Susan's body was nude except for a pair of socks, a blouse, and a bra partially pulled out from under the blouse. Six footprints of what appeared to be tennis shoes were located near the body and photographed. (19 RT 4678-4682.)

Meanwhile, Chaplain Morgan had obtained a tape recorder and a telephone recording device and connected it to the Jordans' telephone. (18 RT 4457-4458.) At about 8:40 p.m. the phone rang and he answered it. A male voice said, "In the tenth row you'll find the body." (18 RT 4458-4459.)

Police officers were sent that night to a telephone booth located at the Texaco station at the intersection of Arlington and Indiana. (19 RT 4623.) A search of the booth revealed two Arlington High School identification cards belonging to Susan Jordan and an envelope or library pouch from some type of school book. (19 RT 4626, 4634, 4786-4787; 20 RT 4861-4863.) Stamped across the envelope were the words "Arlington High School." (20 RT 4863.)

In the early morning of October 29, 1980, police officers set up road

blocks on the streets surrounding the area of the orange grove. Police stopped passerbys and questioned them regarding the killing of Susan. (19 RT 4726-4727.) As a result of the roadblock, police obtained information from several individuals. Among them was Wylie Eng, a student at Arlington High School. (17 RT 4119-4120, 4159.) Eng indicated he normally saw Susan walking to school and that he usually passed her on his bicycle. On the morning of October 28, 1980, he left home for school at about 7:30 a.m. While en route to school, he saw Susan walking toward Van Buren Boulevard and then onto the bike trail toward Gibson Street near the orange grove. She was carrying her books. (17 RT 4123-4131.) As Eng approached Gibson Street, he saw a black man wearing green shorts and a green and white baseball

shirt approaching the bike trail from Gibson Street. (17 RT 4132-4133.) Near the intersection of Gibson and Victoria Streets Eng saw a copper colored Trans-Am, new model, parked on Gibson Street. (17 RT 4136-4137.)

Eng subsequently was shown a photo lineup and he picked out respondent's photo as the black man he saw on the morning of October 28, 1980, near the orange grove. (17 RT 4177; 21 RT 5225.)

Julie Pim, another Arlington High School student, was also interviewed by police. On the morning of October 28, 1980, at about 7:30 a.m. she and her brother left for school. As they drove by the intersection of Victoria Street and Van Buren Boulevard, she saw Susan cross the intersection and continue walking toward Gibson Street. Susan was carrying her books up against her chest.

(17 RT 4179-4186.) She saw a black man standing on the curb near the intersection of Victoria Street and Van Buren Boulevard. He wore green shorts and a white and green top. (17 RT 4187.) Pim picked out respondent's photo from a police photo lineup. (17 RT 4227, 4239, 4241; 21 RT 5223-5224.) She identified respondent at the preliminary hearing and at trial as the black man she saw that morning near the orange grove. (17 RT 4188, 4232, 4242.)

Lonnie Boozell drove his daughter to school on the morning of October 28, 1980. He saw Susan walking near Van' Buren Boulevard and Gibson Street. She was carrying her books. Approximately 70 feet from Susan he saw a black man behind a tall tree between Van Buren Boulevard and Gibson Street. The black man had

jogging clothes on and appeared to be jogging in place. (17 RT 4245-4253.)

Henry Garcia and Joseph Yancey carpooled to work on the morning of October 28, 1980. While driving on Victoria Street near Van Buren Boulevard, they saw Susan walking. Approximately 15 feet behind her they saw a black man wearing jogging clothes (i.e., shorts). (17 RT 4278-4291, 4319-4327.) At trial Garcia identified respondent as being similar to the black man he saw walking behind Susan that morning. (17 RT 4292.)

Marsha Johnson informed police she had driven by the area on the morning of October 28, 1980. She saw a newer model dark brown Trans-Am parked on Gibson Street. The license plate was a dealer paper plate which had "Made in America" written on it. (18 RT 4337-4345.)

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Raymond Rogers was also in the area of Gibson and Victoria Streets at about 7:40 a.m. on October 28, 1980. He saw a "Pontiac or Camaro" parked on "Gibson with a license plate that read "Made in USA" or "Made in America." (18 RT 4364-4371, 4384-4389.)

Michael Cornell, another Arlington High School student, also saw a Trans-Am parked on Gibson Street on the morning of October 28, 1980. The license plates read "Made in America." (18 RT 4397-4414.) At trial he identified respondent's vehicle as being similar to the car he saw that morning. (18 RT 4414.)

Peter Rodriguez saw a brown Trans-Am parked on Gibson Street on the morning of October 28, 1980. It had an unusual license plate which read "USA" or "America" on it. (18 RT 4468-4472.) He

saw a black man come out of the area of the orange grove and walk around to the driver's side of the Trans-Am. The black man thereafter opened the trunk area of the vehicle. The individual kept staring at Rodriguez. (18 RT 4476-4477.) At trial Rodriguez identified respondent's vehicle as being similar to the Trans-Am he saw that day and testified respondent looked similar to the black man he saw but he was not certain. (18 RT 4475, 4480 4481.)

Margery Johnston, a county employee, rode her bicycle to work on the morning of October 28, 1980. As she rode on the bike path adjacent to the orange grove on Gibson and Victoria Streets, she saw a black man wearing jogging clothes come out of the orange grove. He appeared startled and his legs were dirty and dusty. (23 RT 5600-5608.) She also

saw a brown sports car parked near the area. (23 RT 5610-5611.) At trial Mrs. Johnston positively identified respondent as the black man she saw that day. (23 RT 56095612.)

On the basis of the information obtained by police from the various witnesses police initiated a surveillance of respondent and his residence on Gertrude Street. (20 RT 4843.) On November 6, 1980, police saw respondent drive up to his residence in a brown Trans-Am. (19 RT 4805-4806.) Subsequently, respondent drove from his residence and was eventually stopped and arrested by police. (19 RT 4807.)

A search warrant for respondent's residence on Gertrude Street was obtained. (20 RT 4847, 4875.) A search of the garage area revealed a paper license plate behind a water heater. The license

plate read "Made in America."^{3/} (20 RT 4848, 4877; 22 RT 5446.) A search of the interior of the residence revealed a Pacific Telephone directory with a page folded back where the listing for the Jordan residence was located. (20 RT 4886-4887.) Police found and seized a book entitled "ALM Spanish Book" with Susan Jordan's signature inside the cover. (20 RT 4889-4890; 23 RT 5640.) Police also located underneath a bed two newspaper articles relating to Susan's death. (20 RT 4881-4885.)

Shortly after completing the search of respondent's house, police went to respondent's place of employment, armed with a search warrant for his locker. (20 RT 4850.) Police searched his locker

3. Respondent had the plate on his Trans-Am in October of 1980. (18 RT 4505, 4518; 22 RT 5445-5446.)

and seized a pair of running shorts, a pair of green jogging shorts, a white and green jersey, boxer shorts, a pair of socks, a brown shirt, and some rags. (20 RT 4852-4856.)

Subsequent to the search of respondent's residence, police learned that Susan had checked out a book entitled "The Citadel." (21 RT 5228, 5242.) Police obtained another search warrant for appellant's residence. Police seized "The Citadel" from appellant's residence. (20 RT 4891-4892.)

(20 RT 4998-5001; 21 RT 5242.)

An autopsy of Susan's body revealed bruises on the nose, back area, right arm, neck, and head. The nature of the bruises suggested she was alive at the time she suffered these injuries. (22 RT 5365-5391.)

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At trial William Anderson and Norm Gibson, who were acquainted with respondent, identified the voice of the caller to the Jordan residence on October 28, 1980, and tape recorded by Chaplain Morgan, as being that of respondent. (22 RT 5449, 5453.)

B. Defense

Respondent's defense at the guilt phase was one of alibi. (23 RT 5775-5780.)

HOW THE FEDERAL QUESTION
IS PRESENTED

At the penalty phase the jury was instructed in the words of CALJIC No. 8.84 that it must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. The prosecutor made a similar argument during voir dire and at the close of the penalty phase.

Respondent Brown contended on appeal to the California Supreme Court that the admonishment not to consider sympathy was error which invalidates the penalty judgment.

The Supreme Court agreed noting that because of individualized sentencing concerns inherent in the Eighth Amendment, federal constitutional law forbids an instruction which denies a capital defendant the right to have a jury consider any sympathy factors raised by the evidence when determining the appropriate penalty.

In addition, the California death penalty law as set forth in Penal Code section 190.3 and as instructed to the jury in CALJIC No. 8.84.2 provides the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances and

shall impose a sentence of death if it concludes that the aggravating circumstances outweigh the mitigating circumstances. Respondent Brown argued that by use of the term "outweigh" and the mandatory "shall" the statute impermissibly confined the jury to a mechanical balancing of aggravating and mitigating factors and constituted a mandatory death penalty that did not allow the trier of fact to consider the offense and the offender.

The California Supreme Court rejected the constitutional attack on 190.3, but noted the statute was valid because the trier of fact was free upon completion of the weighing process to determine whether the death penalty was appropriate.

The court then noted in a footnote to the opinion that prior death

penalty judgments could be open to question if the record reflected the trier of fact was confused as to its role in making the penalty determination. The court also indicated that trial courts in the future should instruct the jury as to the scope of its discretion and responsibility in accord with the principles set forth in the opinion.

Petitioner's timely petition for rehearing urged that the California Supreme Court decision was erroneous. Petitioner argued CALJIC No. 8.84 did not preclude the jury from considering any evidence which might be mitigating. Instead, the jury was instructed to consider all the evidence.

Petitioner also argued CALJIC No. 8.84.2 was a correct interpretation of 190.3 without additional instructions and the trier of fact could be told it

shall impose the death penalty if the aggravating factors outweigh the mitigating factors.

The petition for rehearing was denied, but the opinion was modified to add a footnote which approved of a jury instruction which allowed the jury to not impose the death penalty if it deemed the punishment to be inappropriate even if it concluded the aggravating factors outweighed the mitigating factors.

REASON FOR GRANTING THE WRIT

The decision of the California Supreme Court that CALJIC No. 8.84 violates the federal Constitution is erroneous as the instruction advising the jury not be swayed by mere sympathy focuses the jury on the offense and the offender rather than extraneous matters. Thus, the giving of this instruction results in jury verdicts that are based on the

offense and the offender, and reduces the likelihood that verdicts will be arbitrary and capricious and contrary to the dictates of Furman v. Georgia (1972) 408 U.S. 238. Certiorari should thus be granted as the California Supreme Court's decision conflicts in principle with Furman, and other decisions of this Court.

Moreover, the decision of the California Supreme Court which, in essence, reads California Penal Code section 190.3 to permit a trier of fact to not impose a death penalty if it finds the penalty inappropriate even if the aggravating factors outweigh the mitigating factors, also puts about 170 prior death penalty judgments into question as these cases did not contain instructions permitting such discretion. In addition, the special instructions approved by the opinion place

an unnecessary burden on the prosecution as it not only must establish that aggravating factors outweigh mitigating factors, but it must also establish that the penalty is appropriate when this is not required by the federal Constitution. In addition, giving a trier of fact discretion to determine whether a penalty is appropriate could result in verdicts that are arbitrary and capricious.

Thus, certiorari should be granted as the opinion of the California Supreme Court on this issue unnecessarily places prior death penalty judgments into question and places an unnecessary burden on the prosecution in future cases although the law as written prior to Brown fully comported with the federal Constitution and is similar to the death penalty law approved by this Court in Jurek v. Texas (1976) 428 U.S. 262.

ARGUMENT

I

IT DOES NOT VIOLATE THE UNITED
STATES CONSTITUTION TO INSTRUCT
A PENALTY JURY NOT TO BE SWAYED
BY MERE SYMPATHY

At the penalty phase of the trial the jury was instructed with CALJIC No. 8.84 which advised the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The prosecutor made similar arguments, both during the voir dire of jurors and at the close of the penalty case. (People v. Brown (1985) 40 Cal.3d 512, 537.)

Respondent Brown contended these admonishments not to consider sympathy were error which would invalidate the penalty phase. The California Supreme Court agreed noting that:

"Because of the individualized sentencing concerns inherent

in the Eighth Amendment, 'federal constitutional law forbids an instruction which denies a capital defendant the right to have the jury consider any "sympathy factor" raised by the evidence when determining the appropriate penalty' Hence it is error to give an anti-sympathy instruction at the penalty phase of a capital trial." (People v. Brown, supra, 40 Cal.3d at p. 537.)

The California Supreme Court also concluded its prior cases required rejection of the State's argument that such an instructional error, if any, was vitiated by the provision of CALJIC No. 8.84.1 which allows the jury to consider "any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Emphasis in original.)

Instead, the court concluded this instruction when combined with CALJIC No. 8.84 was calculated to divert

the jury from its constitutional duty to consider any sympathetic aspect of the defendant's character. (People v. Brown, supra, 40 Cal.3d at p. 537.) The court concluded this result violated prior opinions of this Court in Eddings v. Oklahoma (1982) 455 U.S. 104, 113-115; Lockett v. Ohio (1978) 438 U.S. 586, 604; and Woodson v. North Carolina (1976) 428 U.S. 280, 304. (People v. Brown, supra, at p. 537.) The court found the error in giving CALJIC No. 8.84 to be prejudicial and reversed the penalty phase.

The holding in Brown is based on a misunderstanding by the California Supreme Court of the prior decisions of this Court. As a result the Supreme Court has read too much into the prior decisions of this Court and has placed an undue burden on prosecutors of the State of California and courts charged with

trying capital cases. For these reasons, it is respectfully requested this Court grant certiorari.

The incorrectness in the decision of the California Supreme Court in People v. Brown, supra, and its forerunners (People v. Lanphear (1984) 36 Cal.3d 163, 166, and People v. Easley (1983) 34 Cal.3d 858, 876), becomes clear when the prior decisions of this Court are examined.

In Furman v. Georgia (1972) 408 U.S. 238, this Court held the death penalty could not be imposed under sentencing procedures that created a substantial risk the death penalty would be imposed in an arbitrary and capricious manner. Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be

suitably directed and limited so as to minimize the rise of wholly arbitrary and capricious action. (Gregg v. Georgia (1976) 428 U.S. 153, 188-189.)

In Gregg v. Georgia, supra, at p. 195, this Court observed that,

"In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (Gregg v. Georgia, supra, at p. 195.)

In response to the concerns of Furman expressed by this Court, some states took all discretion away from the jury and enacted statutes which required the

jury impose the death penalty if it concluded the defendant had committed a certain crime. (Woodson v. North Carolina (1976) 428 U.S. 280.) This Court concluded such laws do not fulfill Furman's basic requirement of replacing arbitrary and wanton jury discretion with objective standards to guide, regulate, and make rationally reviewable the process of imposing a death sentence. (Id., at p. 303.) Moreover, such laws do not permit particularized consideration of relevant aspects of the character and record of each convicted defendant before imposition of the death sentence. (Id. at p. 303.)

Since Woodson, this Court has repeatedly noted the touchstone of a valid death penalty law is that it permit the trier of fact that is to determine death be able to consider the facts

surrounding the offense and the offender. (Lockett v. Ohio, supra, 438 U.S. at p. 604; Eddings v. Oklahoma, supra, 455 U.S. at pp. 113-115.)

Indeed, in Lockett and Eddings this Court observed that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death. (Lockett v. Ohio, supra, at p. 604.)

Thus, in essence, this Court has concluded in Furman a trier of fact is not to be given unlimited or arbitrary discretion in determining whether to impose the death penalty. In addition, after Lockett and Eddings the trier of

fact may be permitted to consider the penalty only after consideration of any aspects of the defendant's character or record or any circumstance of the offense the defendant proffers as a basis for a sentence less than death.

The California Supreme Court in this case concluded that admonishing the jury not to be swayed by mere sympathy in argument, voir dire, or CALJIC No. 8.84, violates Lockett and Eddings as it precludes the jury from considering mitigating evidence relating to the offender. However, this holding misreads Furman, Lockett, and other decisions of this Court.

CALJIC No. 8.84 simply tells the jury not to be swayed by mere sentiment, sympathy, conjecture, passion, prejudice, public opinion or public feeling. This means the trier of fact

is not to decide the case based upon unfettered or untethered emotions unrelated to the facts and circumstances of the offense or the offender. Rather, the trier of fact is to determine the punishment based upon an analysis of the facts and circumstances of the case as related to the offense and the offender.

Such an instruction is consistent with Furman v. Georgia, supra, as it tells the jury not to arbitrarily decide the punishment based on factors unrelated to the facts and circumstances of the case or the offender, and based solely on emotion. Indeed, the instruction advises the jury to avoid the very problem addressed in Furman: unfettered and arbitrary decision making by the trier of fact unrelated to the facts of the case or the character and record of the defendant.

Such an instruction also is consistent with the decision of this Court in Roberts v. Louisiana (1976) 428 U.S. 325. In Roberts, a post-Furman case, a plurality of this Court struck down a Louisiana death penalty law that required the death penalty be imposed if the trier of fact convicted the defendant of first degree murder, but permitted the jury, without any standards or evidence of lesser included offenses, to find the existence of the lesser included offenses of second degree murder or voluntary manslaughter as a means of showing mercy. This Court concluded this procedure resulted in standardless and arbitrary and capricious decision making by the trier of fact contrary to the dictates of Furman.

Roberts makes it clear that while a trier of fact is to consider as

mitigating evidence any aspect of the defendant's character or circumstances relating to the offense, the trier of fact does not have unlimited discretion to render a verdict based on sympathy or emotion unrelated to the facts of the case.

Indeed, Lockett v. Ohio, supra, 438 U.S. at p. 604, fn. 12, makes it clear the trier of fact is only to consider evidence bearing on the offense and the offender that is relevant to the facts of the case and the offender. "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or circumstances of the offense."

The giving of CALJIC No. 8.84 did not violate the federal constitution. It precluded the jury from being swayed by mere emotion unrelated to the fact of

the case or the offender which could result in arbitrary and capricious decision making. Instead, it limited the jury to a consideration of the facts and circumstances of the case relevant to the offense and the offender as mandated by Roberts and Lockett.

Moreover, the jury was instructed in this case with CALJIC No. 8.84.1 which allowed the jury to consider various factors relating the offense and the offender. Subsection (k) of this provision indicates the jury may consider any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC No. 8.84.1 thus allowed the jury to consider all relevant evidence relating to the offense and offender as mandated by this Court in

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Lockett and Eddings, while CALJIC No. 8.84 cautioned the jury to not be swayed by mere emotion and thereby precluded the jury from making an arbitrary and capricious decision as condemned by this Court in Furman and Roberts. Thus, CALJIC No. 8.84 was properly given here and is consistent with the holdings of this Court. Moreover, admonitions to the jury not to be swayed by mere sympathy or emotion were also proper.

However, the California Supreme Court has suggested CALJIC No. 8.84.1, subdivision (k) might not comport with federal constitutional standards as it does not permit the trier of fact to consider mitigating evidence relating to the offender, but only the offense.

However, the language of subsection (k) clearly indicates it deals with any circumstance mitigating the offense

including those involving the offender. Moreover, to adopt the approach of the California Supreme Court would mean that CALJIC No. 8.84.1 probably violates Lockett v. Ohio, supra, 438 U.S. 586. However, CALJIC No. 8.84.1 as given essentially is a restatement of Penal Code section 190.3 and this Court has concluded 190.3 is consistent with Lockett. Thus, CALJIC No. 8.84.1 as given measures up to the standards in Lockett and deals with the offense and offender as well.

As this Court noted in California v. Ramos (1983) 463 U.S. 992, 1005, fn. 19:

"We note further that respondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of

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Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops.3d 26 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case. Cal. Penal Code Ann. § 190.3 (West Supp. 1983)."

Thus, any argument regarding defects in CALJIC No. 8.84.1 is meritless here. In addition, nothing in the instruction precludes the jury from considering any mitigating factor that might not be mentioned by the statute or the instruction.

In addition, this Court again upheld 190.3 and the entire California death penalty law in Pulley v. Harris (Jan. 23, 1984) ___ U.S. ___ (79 L.Ed.2d 29), noting that:

"By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small sub-class of capital-eligible

cases The statutory list of relevant factors, applied to defendants within this subclass, 'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty.' Harris v. Pulley, 692 F.2d, at 1194, 'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate,' id., at 1195. The jury's 'discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Gregg, 428 US, at 189, 49 L Ed 2d 859, 96 S Ct 2909. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system, without any requirement or practice of comparative proportionality review cannot be successfully challenged under Furman and our subsequent cases." (Pulley v. Harris, supra, 79 L.Ed.2d at p. 29; emphasis added.)

Thus, under the instructional scheme of this case, CALJIC No. 8.84.1 allowed the jury to consider all relevant mitigating evidence relating to the offense and the offender. CALJIC No. 8.84 on the other hand precluded the jury

from rendering a verdict of death based on untethered emotions or sentiment. Thus, it and similar admonitions were properly given in this case as a means of precluding the jury from rendering an arbitrary and capricious finding.

Consequently, the California Supreme Court erroneously concluded the trial court improperly instructed the jury with CALJIC No. 8.84. The instruction instead was consistent with the dictates of the Eighth and Fourteenth Amendments and the decisions of this Court. Indeed, it was used to preclude the very problems raised by this Court in Furman. Thus, it is requested that certiorari be granted on this issue. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than

caprice and emotion." (Gardner v. Florida (1977) 430 U.S. 349, 358.)

In People v. Brown, supra, 40 Cal.3d at p. 538, fn. 7, the California Supreme Court also concluded the portion of CALJIC No. 8.84 which advised the jury to render a just verdict regardless of the consequences would be understood by the jury in the same light as an instruction to disregard sympathy and thus indicated this part of CALJIC No. 8.84 should not be given.

However, as noted with regard to the other provision of this instruction, it does not violate the federal Constitution to advise the jury to render a just verdict regardless of the consequences. The instruction tells the jury not to consider unrelated facts, emotions, or consequences, but to simply weigh the facts relating to the offense

and the offender. This is consistent with Lockett and Eddings and comports with the mandate of Furman that the jury not have untrammelled discretion.

Thus, the California Supreme Court also erroneously concluded this provision of CALJIC No. 8.84 violated the United States Constitution.

* * * * *

II

THE EIGHTH AMENDMENT DOES NOT
REQUIRE A JURY BE GIVEN DIS-
CRETION NOT TO IMPOSE THE DEATH
PENALTY ONCE IT HAS CONCLUDED
AGGRAVATING FACTORS OUTWIEGH
MITIGATING FACTORS

In People v. Brown, supra, 40
Cal.3d 513, the California Supreme Court
also upheld the provision of the
California death penalty law in Penal
Code section 190.3 which describes how
the jury shall weigh and consider the
aggravating and mitigating factors.
However, the court once again misread the
mandate of prior decisions of this Court
while upholding the statute and thereby
put into question about 170 prior death
penalty judgments in California. (See
Lucas, J., concurring dissenting, People
v. Brown, supra, 40 Cal.3d at pp.
546-548.) The opinion also fostered a
jury instruction which allows a jury in

future cases to avoid imposing the death penalty even if it concludes the aggravating factors outweigh the mitigating factors as required by Penal Code section 190.3 if the jury feels the penalty would not be appropriate. This instruction places an undue burden on the prosecution which must not only prove the aggravating factors outweigh the mitigating factors, but must also convince the jury the penalty is appropriate. Consequently, it is requested certiorari be granted in this case.

The various factors the trier of fact is to consider in deciding to impose the death penalty are set forth in Penal Code section 190.3, supra.

Penal Code section 190.3 then explains how the trier of fact is to analyze these factors:

"After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (Pen. Code § 190.3; emphasis added.)

Respondent Brown attacked the latter provision of Penal Code section 190.3 on two grounds. First, he noted that section 190.3(k) directed the jury to consider as a mitigating factor any circumstance which extenuates the gravity of the crime even though not a legal excuse to the crime, but it did not expressly state the jury's further

constitutional duty to consider in mitigation all other sympathetic evidence a defendant may offer about his character and background, even if it is unconnected to the charged crimes.

Brown also argued by use of the term "outweigh" and the mandatory "shall" the statute impermissibly confined the jury to a mechanical balancing of aggravating and mitigating factors. Brown also argued that because the statute required a death judgment if the former outweighed the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty. (People v. Brown, supra, 40 Cal.3d at p. 539.)

In answering Brown's first challenge to the law, the court neglected

to note, as petitioner has previously noted here, that this Court has concluded the provision of Penal Code section 190.3 subdivisions (a) through (k) comport with the federal Constitution and the Lockett decision. (California v. Ramos, supra, 463 U.S. 992; Pulley v. Harris, supra, 79 L.Ed.2d 29.)

In addition, however, the court noted that Penal Code section 190.3 subdivision (k) had been interpreted by that Court previously in such a way that it would comport with what the California Supreme Court believed the Lockett decision required. (Thus, Penal Code section 190.3 subdivision (k) prospectively was to read that the jury could consider as a mitigating factor "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse

for the crime and any other aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (People v. Brown, supra, 40 Cal.3d at p. 541.)

The California Supreme Court also noted the weighing provisions of section 190.3 also did not violate the United States Constitution.

"Similarly, the reference to 'weighing' and the use of the word 'shall' in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors

he is permitted to consider, including factor 'k' as we have interpreted it. By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case." (People v. Brown, supra, 40 Cal.3d at p. 542; footnotes omitted.)

The Supreme Court went on to conclude that the 1978 death penalty law interpreted this way is not invalid on the ground that it withdraws constitutionally compelled sentencing discretion from the jury. (Id., at p. 545.) After reaching this conclusion, the court, in a footnote amplified its holding by noting the instruction that the jury "shall"

impose a sentence of death could be confusing. Consequently, the jury should be instructed as to the scope of its discretion and responsibility as stated in the opinion.

"We acknowledge that the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role. Indeed, such confusion is occasionally reflected in records before this court. For that reason, trial courts in future death penalty trials--in addition to the instruction called for by Easley, supra, 34 Cal.3d at page 878, footnote 10--should instruct the jury as to the scope of its discretion and responsibility in accordance with the principles set forth in this opinion. We pass no judgment here upon the validity of death penalty verdicts previously rendered without benefit of the Easley instruction or the instruction we now require. Each such prior case must be examined on its own merits to determine whether, in context, the sentencer may have

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been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." (People v. Brown, supra, 40 Cal.3d at p. 545, fn 17.)

The footnote also left open to question prior death judgments that did not have an instruction as noted in footnote 17.

The court thereafter denied a request of the State of California for a rehearing. For guidance, however, the court noted a proposed instruction adopted by a California committee on criminal jury instructions (CALJIC) conformed with the reasoning expressed in footnote 17. The instruction reads as follows:

"The weighing of aggravating and mitigating circumstances does not mean a mere mechanical weighing of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them.



You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence [circumstances] is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'" (People v. Brown, supra, 40 Cal.3d at p. 545, fn. 17; emphasis added.)

The essential problem is that while the court upheld Penal Code section 190.3, it read the prior decisions of this Court too broadly to preclude a trier of fact from being required to impose the death penalty where the aggravating factors outweighed the mitigating factors. Instead, the court held that the federal Constitution requires that

section 190.3 be construed so as to permit the sentencing jury the discretion to determine whether the sentence of death is appropriate irrespective of the weight of aggravating and mitigating factors.

This holding is inconsistent with the decision of this Court in Jurek v. Texas (1976) 428 U.S. 262. In Jurek this Court upheld the Texas statute which permitted the consideration of mitigating evidence, but required the imposition of a death sentence if the jury answered "yes" to specified questions. If such a mandatory death penalty law will pass constitutional muster, there is no reason why the California law which permits the jury to take into account and be guided by the aggravating and mitigating factor and to impose the death penalty if the aggravating factors outweigh the mitigating factors should not also be valid.

A close reading of Jurek v. Texas indicates that a law such as California's which mandates the imposition of the death penalty if the trier of fact determines aggravating factors outweigh mitigating factors does not violate the Constitution for two specific reasons.

First, by requiring the trier of fact find aggravating circumstances after finding a defendant guilty of first degree murder, the law limits the category of murderers who can face the death penalty. Moreover, it requires the trier of fact to focus on the particularized nature of the crime. Jurek places great emphasis on this fact. (See Jurek v. Texas, supra, 428 U.S. at pp. 270-271.) In addition, as in Jurek, the California law permits the trier of fact to consider any relevant mitigating evidence before

making the penalty determination.

According to Jurek, this factor too is important. (See Jurek v. Texas, supra, 428 U.S. at pp. 271-272.)

According to Jurek, if a state law narrows the class of murderers who can receive the death penalty by having the trier of fact consider aggravating circumstances and that same state law requires the trier of fact consider mitigating circumstances, then a law which mandates imposition of the death penalty if the trier of fact reaches a certain conclusion (in Jurek an answer to a specific question and in California the fact that aggravating factors outweigh mitigating factors) passes constitutional muster.

Thus, the California death penalty law as stated in Penal Code section 190.3 without the judicial gloss

placed on it in Brown passes constitutional muster. Indeed, this Court specifically upheld the California law in toto in Pulley v. Harris, supra, 79 L.Ed. 2d at p. 42.)

In addition, this Court has upheld the Florida death penalty law which requires a sentence of death be imposed if the aggravating factors outweigh the mitigating factors. (See Proffitt v. Florida (1976) 428 U.S. 242.) If Florida's law, which is similar to California's law, is valid under the federal Constitution, the California Supreme Court certainly had no basis for interpreting the California law to give the jury discretion to determine if the death penalty was appropriate even after it had concluded the aggravating factors outweighed the mitigating factors.

In addition, the language of Brown is susceptible to causing mischief of federal constitutional dimensions. Brown suggests the trier of fact should have some leeway in determining whether the death penalty is appropriate even after weighing the aggravating and mitigating factors and concluding the aggravating factors outweigh the mitigating factors.

However, this could result in decisions to impose the death penalty which are not specifically guided, but are arbitrary and capricious. (See Barclay v. Florida (1983) 463 U.S. 939.) This Court has condemned death penalty verdicts that are achieved by such means. ". . . [D]iscretion must be suitably directed and limited so as to minimize

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the risk of wholly arbitrarily and capricious action. Gregg v. Georgia, 428 U.S. 153, 189 (1976). . . ." (Zant v. Stephens (1983) 462 U.S. 862, 874.)

In addition, the construction placed on the death penalty law by the California Supreme Court places the prosecution at a disadvantage. For even if the prosecution establishes that aggravating factors outweigh mitigating factors as required by the statute for imposition of the death penalty, the trier of fact may still decide on its own that such a penalty is inappropriate and impose the punishment of life without possibility of parole. However, the United States Constitution does not require the jury be given so much leeway. Instead, the Constitution only requires the trier of fact be given the opportunity to consider aggravating and miti-

gating factors before being given a mandate to impose or not impose the death penalty. Thus, the interpretation of Penal Code section 190.3 by the Supreme Court of California while upholding the law places the State of California at an unfair advantage. Not only must it prove to the trier of fact that aggravating factors outweigh mitigating factors to procure the death penalty, but it must also convince the jury that the punishment is appropriate.

Thus, Brown unnecessarily penalizes the prosecution of future death penalty cases and places an unnecessary burden on the prosecution. Moreover, the Brown decision, particularly footnote 17, casts serious doubt on the validity of about 170 prior death penalty judgments in light of the constitutional interpretation of Penal Code section 190.3 by the

Brown court. Thus, although the court technically upheld section 190.3, it placed in jeopardy prior death penalty judgments in California and imposed an unnecessary burden on the prosecution. Moreover, Brown leaves open the possibility that in a given case a trier of fact could arbitrarily and capriciously determine a penalty contrary to the dictates of prior decisions of this Court. For these fundamental reasons, it is requested certiorari be granted to overturn the ruling of the California Supreme Court on this issue.

* * * * *

CONCLUSION

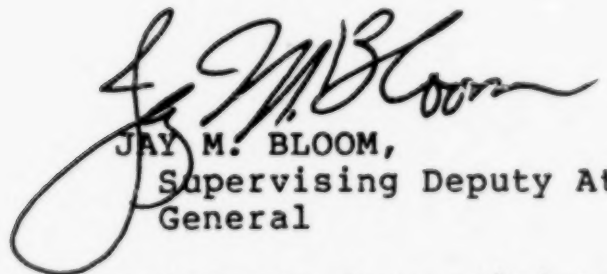
Therefore petitioner respectfully requests this Court grant certiorari.

Respectfully submitted,

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No:

October Term, 1985

PEOPLE OF THE STATE OF
CALIFORNIA

Petitioner,

v.

110 West A Street, Suite 700
San Diego, California 92101

ALBERT GREENWOOD BROWN,

Respondent

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICES as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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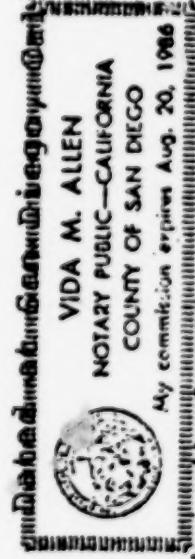
Supreme Court of California
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Each envelope was then sealed and with the postage pre-paid deposited in the United States mail by me at San Diego, California, on the 20 day of March, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.



March 20, 1986.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 20th day of March, 1986.

Vida M. Allen
Notary Public in and for said County and State

85-1563

Supreme Court, U.S.

FILED

MAR 22 1986

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner and Respondent,

v.

ALBERT GREENWOOD BROWN,

Defendant and Appellant.

APPENDICES TO PETITION FOR WRIT OF
CERTIORARI TO THE CALIFORNIA
SUPREME COURT

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APPENDIX A

Opinion of the
Supreme Court of the
State of California
in People v. Brown
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Court No. CR-18104

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Order Denying Rehearing
and Modifying the Opinion

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APPENDIX A

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

APPENDIX A

[Filed December 5, 1985]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE)	Crim. 22501
STATE OF CALIFORNIA,)	S.C. No. CR-
)	18104
Plaintiff and)	
Respondent,)	
)	
v.)	
)	
ALBERT GREENWOOD)	
BROWN,)	
)	
Defendant and)	
Appellant.)	

Defendant Albert Greenwood Brown, Jr., was convicted on one count of rape (Pen. Code, § 261, former subd. (3))^{1/} with the infliction of great bodily injury (§ 12022.8) (count I) and one count of first degree murder (§§ 187, 189) (count II). The jury made a special finding that the murder was premeditated.

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1. All statutory references are to the Penal Code unless otherwise indicated.

A special circumstance that the murder was committed in the court of a rape (§ 190.2, subd. (a)(17)(iii)) was found true. Defendant admitted allegations that he had suffered a prior conviction and prison term for rape. (§§ 667.5, subd. (a), 667.6, subd. (a).)

Acting under the 1978 death penalty initiative law (§§ 190.1-190.7), the jury fixed the punishment on count II as death. The court denied the automatic application for modification of judgment (§ 190.4, subd. (e)) and imposed a further sentence of thirteen years on count I (the upper term for rape, plus a consecutive five years for the great bodily injury) with a five-year enhancement for the prior prison term. This appeal is automatic.

Defendant raises several claims of error at the guilt and special cir-

cumstance phase of his trial. We find merit in defendant's contentions that the testimony of a hypnotized witness, evidence of forensic tests of crime scene fluid stains, and statistics about defendant's blood characteristics were improperly admitted at the guilt phase. However, we conclude that the errors were harmless in light of the extremely strong evidence against him. We will therefore affirm the guilt and special circumstance findings.

At the penalty phase, we agree with defendant's objection to instructions that the jury must not be swayed by sympathy or consequences in choosing a sentence. Prior authority of this Court flatly prohibits the giving of such antisympathy instructions at a capital

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penalty trial. (People v. Lanphear (1984) 36 Cal.3d 163, 166; People v. Easley (1983) 34 Cal.3d 858, 876.) We are persuaded that their inclusion in this case was prejudicial on the issue whether defendant should live or die. The penalty Judgment must therefore be reversed.

Defendant also argues that the 1978 death penalty law is unconstitutional, and contends he cannot be resentenced under its provisions, on grounds among others that it impermissibly provides for a mandatory death penalty under certain circumstances. We will conclude that the 1978 statute, correctly construed, preserves the jury's constitutional discretion to decide the appropriate penalty and is therefore valid. We will note, however, that trial

court's in future cases should give instructions which clarify the sentencer's responsibility.

I. GUILT TRIAL

A. Prosecution case.

On October 28, 1980, about 7:30 a.m., 15-year-old Susan J. left her home on Victoria Avenue in Riverside to walk to school with her younger brother and sister. After the younger children left Susan to walk to their elementary school, she continued up Victoria Avenue toward Arlington High School. She never arrived, and efforts throughout the day to locate her were unsuccessful. Her parents telephoned the police.

Sometime between 7 and 7:30 that evening, the telephone at Susan's home rang, and Susan's mother answered it. The male-voiced caller said, "Hello, Mrs. J., Susie isn't home from school

yet, is she?" Mrs. J. replied that she was not. The voice then declared, "You will never see your daughter again. You can find her body on the corner of Victoria and Gibson." At Mrs. J.'s request, the caller repeated the information, then hung up. Mrs. J. telephoned the police again.

Around 7:30, the Riverside Police Department received another call. A male voice said, "On the corner of Gibson and Victoria, fifth row, you will find a white caucasian body of a young girl in the orange grove."

Police officers were sent with a police dog to the orange grove at the corner of Gibson and Victoria. They found nothing. Officer Taulli, one of the policemen at the scene, went to the

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J. residence to get an article of Susan's clothing to be used by the dog as a scent guide.

Officer Taulli arrived at the J. home about 8:30; police chaplain Phillip Morgan arrived at the same time. While Taulli was still there, the telephone rang, and he answered it. A male voice asked if "this [is] the [J.] house or the [J.] residence?" Taulli advised that it was. The caller said, "You can find Sue's identification in a telephone booth at the Texaco station at Arlington and Indiana." Taulli told Morgan and Mrs. J. to record any further calls verbatim, then returned to the grove with an article of Susan's clothing.

After sniffing the item brought by Taulli, the dog shortly found a pair of torn panties in the grove. The dog

then led police down the next six rows of trees. There Susan's body was found lying face down, with dirt piled up on both sides of the head. The body was nude below the waist, except for socks, and Susan's bra was partially pulled out from under her blouse. Several school notebooks and Susan's tennis shoes were found near the body. Her jeans were located elsewhere in the grove. A shoelace, apparently from one of her shoes, was wrapped tightly around her neck. Susan was holding a spark plug wire cap in her hand, and a spark plug wire was discovered nearby.

Homicide investigators were called to the scene. They found signs of a struggle and indications that the body had been dragged for some distance. Shoeprints in a herringbone pattern were found around the body and

photographed. Susan's blouse was stained and swabs were taken from her vagina and abdomen.

The same night, officers were sent to the Texaco station at the corner of Arlington and Indiana. There, in a telephone booth, they discovered two Arlington High School identification cards belonging to Susan and a library pouch from a book. The pouch was stamped with the words "Arlington High School."

Meanwhile, Chaplain Morgan had obtained a tape recorder and hooked it up to the J.s' phone. About 9:30 p.m., the phone rang again. The same male voice said, "In the tenth row, you'll find the body."

Early next morning, the police set up roadblocks on the streets near the grove and questioned passersby. Several remembered seeing Susan the morning

before, walking on a bike trail through the grove in the block of Victoria between Gibson and Van Buren Boulevard. Others had additionally seen a black man approaching Susan on the bike trail, standing in the grove as she walked by, or following her. The man was wearing jogging clothes; two witnesses more particularly described green running shorts and a green and white shirt.

A number of people also recalled seeing a late-model brown or copper-colored Pontiac Trans-Am parked nearby; it bore a distinctive paper license plate with the words "Made in USA" or "Made in America." Peter Rodriguez saw a black man emerge from the grove and open the trunk of the Trans-Am; the man kept staring at Rodriguez. Margery Johnston also saw a black man in running clothes come out of the grove. He

appeared startled and his legs were dusty or dirty.

Police began a surveillance of defendant's Gertrude Street residence. On November 6, he drove up in a brown Trans-Am; he was arrested when he drove away again. Warrant to search the residence was obtained and executed that evening. Behind a water heater in the garage, police found a crumpled-up paper license plate which read "Made in America." Inside the house, a telephone directory was turned back to the page containing the J.s' listing. There were newspaper articles about Susan's death under defendant's bed, and two of her missing schoolbooks were found in the den. The library pouch found in the telephone booth had come from one of the books.

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Defendant's locker at work was also searched. Police seized jogging clothes, including green running shorts and a green and white shirt. Undershorts found in the locker had semen stains. The locker also contained running shoes; the pattern of their soles closely matched the shoeprints found at the crime scene.

Tests determined that Susan had died by strangulation sometime between 7 and 11 a.m. on October 28. Analyses of the stains and swabs obtained from the body revealed the presence of semen.

Three witnesses positively identified defendant at trial as the man they saw in the vicinity of the grove on the morning of October 28. Wiley Eng, a high school student, said he was riding his bicycle on the bike trail in the

grove. He overtook Susan, who was travelling on foot in the same direction, in the block between Van Buren and Gibson. He then passed the man, who was walking toward him, at a distance of two or three feet. Eng had some three seconds to see the man's face. He had picked defendant from a photo lineup, saying then he was 60 to 70 percent sure it was the same man. His identification at the preliminary hearing and at trial were unequivocal, though he admitted newspaper photos of defendant had helped him decide.

Julie Pim, another high school student, testified she was a passenger in her brother's truck, which had stopped for a red light at Victoria and Van Buren on the way to school. From 40 feet, she saw Susan, whom she knew from elementary school, pass close to a man she

identified as defendant while crossing the intersection. Ms. Pim had picked defendant from a photo lineup of eight black males, saying she was 60 percent certain and could tell better in person. She saw defendant's newspaper photo before the preliminary hearing, but she denied it aided her positive identification at that proceeding. She admitted that she might have been influenced at the preliminary hearing by the fact that defendant was the only black person present.

Margery Johnston also positively identified defendant at trial. She had been unable to pick defendant from a photo lineup while under hypnosis. She testified that he appeared different in person than in the photos.

Henry Garcia and Peter Rodriguez testified that defendant looked

like the man they had seen that morning, but neither could be certain. Several witnesses confirmed that the photos of defendant's car produced at trial matched the automobile parked near the grove on the morning of October 28.

Over defendant's objection, Faye Springer and Rodney Andrus, two criminalists from the California Department of Justice (CDJ), testified on the results of their comparison of the victim's and defendant's blood, the blouse stains, the vaginal and abdominal swabs, and the semen stains on the undershorts taken from defendant's locker. Tests were performed in four categories of inherited genetic characteristics (see discussion, post). Springer testified that the stains and swabs matched defendant's genetic characteristics in several respects, and that

defendant's characteristics were shared by only a small percentage of the black population.

William Anderson and Norm Gibson, acquaintances of defendant, identified the voice on the taped call to the J. residence as that of defendant.

B. Defense case.

Defendant presented an alibi defense. His mother testified that defendant lived with her at the Gertrude Street house in October 1980. She arrived home from work at 7:40 a.m. on October 28. Defendant was at home. He left to buy milk and returned at 7:48. He ate breakfast and left for work at 8:14.

II. PENALTY TRIAL

At the penalty phase, the prosecution presented evidence of defendant's 1977 rape of 14-year-old

Kelly P. Defendant pled guilty to the rape and was sentenced to state prison. He was released in June 1980 on one year's parole.

The defense presented psychiatric and background evidence suggesting that defendant suffered severe emotional problems, including extreme sexual maladjustment and dysfunction. Numerous relatives testified to their affection for defendant. Defendant himself took the stand, expressed remorse for his rape of Kelly P., and asked the jury to show mercy.

III. GUILT ISSUES

A. Failure to permit expert testimony on eyewitness identification.

At trial, defendant offered Dr. Robert Shomer, a psychologist, as an expert witness on the factors which may cause mistaken observations by

eyewitnesses. The People objected on grounds there was no showing that any witness had specific psychological problems which might cause abnormal perception. The trial court refused to permit Dr. Shomer's testimony. Defendant argues he was thus denied his due process rights to present witnesses in his defense. (Chambers v. Mississippi (1973) 410 U.S. 284, 302.)

The trial court relied on the then-established rule (e.g., People v. Guzman (1975) 47 Cal.App.3d 380, 385-386; People v. Johnson (1974) 38 Cal.App.3d 1, 6-7) that expert testimony of this type may be excluded if it relates to "normal" eyewitnesses, since the variables affecting normal perception are common knowledge and the expert testimony tends to invade the province of the jury. Our

recent decision in *People v. McDonald* (1984) 37 Cal.3d 351, however, makes clear that expert "eyewitness" testimony is not excludable on either of these traditional grounds.

As McDonald notes, many factors which compromise the accuracy of eyewitness observation extend beyond lay understanding so that expert information on the subject "would assist the trier of fact." (P. 369; see Evid. Code, § 801, subd. (a).) Moreover, McDonald observed, such testimony does not invade the jury's province, since it expresses no view on the credibility of a particular eyewitness; in any event, California has rejected the rule that expert testimony is inadmissible when it coincides with the "ultimate issue" in the case. (P. 371.)

Trial courts retain discretion under McDonald to exclude expert testimony of this kind on grounds that it is unnecessary in a particular case, but appellate deference not absolute. "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.

[Fn. omitted.]⁴ (p. 377.)

Applying the Watson standard of prejudice (People v. Watson (1956) 46 Cal.2d 818, 836), we concluded that the trial court in McDonald had abused its discretion when it excluded the expert testimony proffered by defendant, and that the error warranted reversal. (P. 376.) McDonald was accused of shooting a robbery victim to death in the street, but no circumstantial evidence linked him to the crime. The People's case hinged entirely on equivocal eyewitness identifications, and one prosecution eyewitness testified unequivocally that McDonald was not the killer. (pp. 355-360.) Numerous defense witnesses insisted that McDonald was in Alabama on the day the robbery-murder occurred. (P. 360.) Thus, the trial court's

exclusionary ruling was "crucial" -- it "undercut the evidentiary basis of defendant's main line of defense" -- and "impair[ed] the jury's determination of an issue that [was] both critical and closely balanced" (P. 376.)

By contrast, ample circumstantial evidence connects defendant in this case to Susan's death. That evidence includes the consistent description of defendant's car, the distinctive license plate found concealed in his garage, the incriminating items retrieved from his residence, and the clothing and shoes recovered from his locker at work. Therefore, We cannot say the trial court abused its discretion by excluding expert testimony on eyewitness identification. Even if

an abuse of discretion is assumed,
the error was clearly harmless.

B. Hypnosis of
prosecution witness.

Defendant urges that the
testimony of Margery Johnston,
including her in-court
identification, must be excluded
under People v. Shirley (1982) 31
Cal.3d 18, because the witness had
previously undergone hypnosis to
enhance her recall. In Shirley this
court ruled that "the testimony of
a witness who has undergone hypnosis
for the purpose of restoring his
memory of the events in issue is
inadmissible as to all matters
relating to those events, from the
time of the hypnotic session forward."
(Pp. 66-67.)

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The People respond first that Shirley is inapplicable, because an extensive voir dire examination of Johnston revealed that her memory of events was not affected by the hypnotic session. Shirley itself concluded, however, that a mere comparison of pre- and posthypnosis statements does not dispel the adverse implications of hypnosis. Hypnosis, said Shirley, not only creates "pseudomemories," it tends "to clothe the witness' entire testimony in an artificial but impenetrable aura of certainty [fn. omitted], . . ." (P. 69.)

The People next suggest that the Shirley rule does not apply to hypnotic sessions conducted before Shirley was filed. This court's recent opinion in *People v. Guerra* (1984) 37 Cal.3d 385 has resolved

that issue. Guerra concluded that the Shirley rule applies to all cases not yet final when it was announced, regardless of when the challenged hypnotic session occurred. Contrary authorities cited by the People, in particular *People v. Williams* (1982) 132 Cal.App.3d 920, were expressly disapproved. (37 Cal.3d at p. 413, and fn. 24.)

However, any error in admitting Johnston's testimony here was clearly harmless. Two other persons, Wiley Eng and Julie Pim, gave unequivocal in-court identifications of defendant as the man they saw near Susan in the orange grove, and his car, with its distinctive license plate, was clearly implicated. Numerous articles linking defendant to the victim were

found in his residence, and further incriminating evidence was discovered in his locker at work. There is no reasonable probability that exclusion of Ms. Johnston's testimony would have produced a different verdict on the issue of guilt.^{2/}

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2. Shirley expressly held that the Watson standard of prejudice would apply to erroneous admission of testimony by a previously hypnotized witness. (31 Cal.3d at p. 68, citing People v. Kelly (1976) 17 Cal.3d 24, 40 [Watson standard applies to admission of scientifically unreliable evidence].) Defendant argues that Shirley error should be evaluated under the more stringent reasonable-doubt standard of Chapman v. California (1967) 386 U.S. 18, 24, since it involves denial of the constitutional right to confront witnesses. (U.S. Const., Amend. VI; Cal. Const., art. I, § 15.) A number of recent decisions in other jurisdictions, both before and since Shirley, have suggested that because the false memories created by hypnosis are impervious to cross-examination,

C. Admissibility of
forensic analysis
of blood and semen
stains.

Over defendant's repeated objections,^{3/} two CDJ criminalists compared their genetic analyses of dried-fluid and stain samples obtained from the victim's body and clothing with the results of blood-grouping tests they had run on samples of defendant's and the victim's blood. The import of their testimony was that certain of the crime-

admission of hypnotically refreshed testimony may deny the right of confrontation. (E.g., United States v. Valdez (5th Cir. 1984) 722 F.2d 1196, 1202; Peterson v. State (Ind. 1983) 448 N.E.2d 673, 678-679; People v. Gonzales (Mich. 1982) 329 N.W.2d 743, 748, mod. (1983) 336 N.W.2d 751; State ex rel. Collins v. Superior Court, etc. (Ariz. 1982) 644 P.2d 1266, 1273-1275; State v. Mena (Ariz. 1981) 624 P.2d 1274, 1280; State v. Mack (Minn. 1980) 292 N.W.2d 764, 769.) At least one court has explicitly applied the reasonable-doubt

[Fn. continued]

scene stains were semen which could have been deposited by defendant. One of these witnesses also stated that, according to theories of statistical probability, only 1.2 percent of the black population would match defendant's genetic characteristics in all the categories tested.

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standard of prejudice, apparently on the ground of constitutional error. (People v. Nixon (Mich.App. 1983) 337 N.W.2d 33, 34-35.) Extended discussion of the issue is unnecessary, since we are persuaded, for reasons explained in the text, that any Shirley error here was harmless even under the Chapman test.

3. Prior to the criminalists' testimony, defendant moved in limine to exclude the stain-test evidence; the court ruled the evidence could come in "if there was a proper foundation." Defendant objected again after Andrus' testimony, and the court reserved its ruling until after Springer's testimony. The defendant objected again at the close of the People's case; the objection was noted and overruled.

Defendant and his amicus, Dr. Benjamin Grunbaum, first contend that admission of the stain-test evidence was error, since the prosecution failed to satisfy the Kelly/Frye rule (Frye v. United States (D.C.Cir. 1923) 293 Fed. 1013, 1014; People v. Kelly, supra, 17 Cal.3d 24, 30) by demonstrating at trial the scientific acceptance of the tests performed. As we will explain, we agree.

The typing of blood under the inherited antigen grounds A, B, and O has long been known, but science has more recently discovered inherited proteins and enzymes which can also be individually typed. Eight of ten persons are "secretors" who carry these substances not only in the blood, but in other body fluids such as semen, vaginal secretions, and saliva. The rough population distributions for the various types of

each of these antigens, proteins, and enzymes have been established, and research suggests they are statistically independent. Thus, the greater the number of categories which can be reliably typed in a particular specimen, the smaller the number of potential donors.

Traditional ABO testing is based on the immunological principle that each antigen type will react characteristically in combination with the others. The typing of more recently discovered proteins and enzymes such as PGM, Peptidase-A, AK, and EAP is accomplished by a method known as electrophoresis. In this system, a test sample is placed on a gel medium in an ionized buffer solution. When an electric current is run through the solution, the sample separates and migrates

on the medium into characteristic patterns. These are then fixed, dyed, and read visually by the analyst. (See generally Jonakait, Will Blood Tell? (1982) 31 Emory L.J. 833, 836-842.)

Using these tests, the criminalists in this case compared dried stains recovered from the victim's clothing, abdomen, and vagina against samples of the victim's and defendant's blood. The crime-scene stains were collected some eight to twelve hours after the victim's death. In one instance, testing occurred some two and one-half months later, after the test sample had been mailed from one CDJ crime laboratory to another.

Three antigen and enzyme categories were tested; ABO, PGM, and Pepidase-A. The criminalists reported inconclusive results in certain instances. However, they determined that the crime-scene

stains were semen, the typing of which matched defendant's blood in certain of the categories tested. No test excluded defendant as a potential donor.

In Kelly, supra, 17 Cal.3d 24, this court affirmed California's adherence to the rule first announced in Frye, supra, 293 Fed. 1013 for the admissibility of a new scientific technique: the technique must be "sufficiently established to have gained general acceptance in the particular field to which it belongs." (Kelly, supra, at p. 30' italics added; Frye, supra, at p. 1014.) Under the Kelly/Frye rule, the proponent of the scientific evidence must establish "(1) the [generally accepted] reliability of the method . . ., usually by expert testimony, and (2) [that] the witness furnishing such testimony [is] properly

qualified as an expert to give an opinion
on the subject. [Citations.]
Additionally, the proponent . . . must
demonstrate that correct scientific pro-
cedures were used in the particular case.
[Citations.]" (Kelly, supra, at p. 20,
all italics in original.)

Kelly further defines who is a
"qualified expert" on the issue of
scientific acceptance. The witness must
have academic and professional creden-
tials which equip him to understand both
the scientific principles involved and
any differences of view on their reliabi-
lity. He must also be "impartial," that
is, not so personally invested in
establishing the technique's acceptance
that he might not be objective about
disagreements within the relevant
scientific community. (Pp. 37-40.)

The witness may cite and rely upon written studies and findings by scientists not actually before the court. (Shirley, supra, 31 Cal.3d at p. 56.) Moreover, because appellate endorsement of a technique ends the need for case-by-case adjudication (Kelly, supra, 17 Cal.3d at p. 32), this court has sometimes looked beyond the trial record, examining California precedent, cases from other jurisdictions, and the scientific literature itself, to ascertain whether a particular technique is generally accepted. (Shirley, supra' at pp. 33-34, 56; Kelly, supra, at pp. 32-35.)

Here, defendant does not seriously dispute the scientific validity of genetic typing tests in general. Rather, he and Dr. Grunbaum focus on the large body of literature which suggests

that drying, aging, temperature, contamination (particularly with bacteria or other organic substances), and unknown composition of the test sample - often encountered in forensic work -- can affect test results in varying degrees. The defense suggests that no standard, proven, and accepted methodology exists to avoid these dangers.

The People concede the problem of sample deterioration. They urge, however, that the antigens, enzymes, and proteins accepted for forensic testing are those most resistant to adverse conditions. Moreover, they suggest, the issue is not the reliability of the tests in general but the testable quality of particular samples. They assert that the factors which may hamper or help preserve testability are generally accepted by scientists and Well known to forensic

analysts; since a forensic witness may be examined on these issues, the factfinder has an adequate basis to evaluate the accuracy of particular test conclusions.

No California appellate decision has ruled on the admissibility of aged-stain typing under Kelly/Frye. Several have confirmed that stain analysis is admissible as relevant evidence though it merely includes the defendant among the class of possible donors. (People v. Lindsey (1978) 84 Cal.App.3d 851, 866; People v. Vallez (1978) 80 Cal.App.3d 46, 56.) this court, suggesting that such tests may be useful and "feasible" to the defense in a rape case, has concluded that vaginal swabs taken by the police are material evidence which must be preserved under People v. Hitch (1974) 12 Cal.3d 641. (People v. Nation (1980) 26 Cal.3d 169, 175, 177.)

However, at least two Courts of Appeal, after a review of scientific literature, have expressed misgivings about the reliability of electrophoretic tests for ABO and PGM typing of post-coital vaginal swabs taken within hours after intercourse. (People v. Newsome (1982) 136 Cal.App.3d 992, 999, fn. 4; People v. Wilson (1982) 128 Cal.App.3d 132, 135-137, and fns. 2, 3.)

Cases in other jurisdictions have considered the scientific-reliability issue directly, with mixed results. Admission of electrophoretic tests of crime-scene stains was upheld in Jenkins v. State (Ga.App. 1980) 274 S.E.2d 618. But Georgia appears to reject the Frye test, allowing the jury to assess the weight and relevance of all expert and scientific evidence. (P. 619.)

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In Robinson v. State (Md.App. 1981) 425 A.2d 211, Jean Hostetler, a forensic chemist employed by the Montgomery County Police Department, testified that electrophoretic techniques were "developed in the late '60's [, are] now an accepted practice in the field of forensic chemistry," and are utilized by large numbers of law enforcement agencies including the Federal Bureau of Investigation. She conceded that electrophoresis was not widely used outside crime laboratories, since classification of the substances at issue, other than the A-B-O antigens, has no medical value. (P. 220.)

The Robinson court concluded that "general acceptance" within the field of forensic chemistry was sufficient; the proponent of electrophoretic evidence did not need to

show approval by the larger scientific community. (Ibid.) It is questionable whether, under our Kelly criteria, the testimony of Hostetler alone would have been sufficient in California to establish acceptance by impartial scientists in the field of forensic chemistry.

Recently, the Michigan Supreme Court reversed an appellate court opinion which had upheld admission of electrophoretic stain tests. (People v. Young (1983) 340 N.W.2d 805, 815.) adhering to the Frye test, the court found that nothing in the trial record sustained the prosecution's burden of showing that the "novel" electrophoretic techniques employed in the case, though undoubtedly accepted as a "diagnostic and research tool," also enjoyed the general support of "disinterested and

impartial experts" in the forensic context. (Pp. 813-814.) The prosecution's sole witness, Mark Stolorow, a Michigan State Police criminalist and codeveloper of the technique, did not demonstrate that the tests were either standardized or "sensitive and specific in measuring what [they purported] to measure." (P. 814.) The Young court declined to undertake its own review of scientific acceptance, but remanded for further hearings in the trial court.

The most complete analysis of electrophoretic stain-test reliability appears in *State v. Washington* (Kan. 1981) 622 P.2d 986. At issue was the Multi-System, a simplified electrophoretic method developed under Law Enforcement Assistance Administration (LEAA) auspices, which allows up to three separate enzymes to be tested in one

medium at the same time. The Washington court weighed testimony by Stolorow and Eileen Burnau, a forensic serologist for the Kansas Bureau of Investigation, supporting the method's reliability and wide acceptance in crime laboratories, against contrary declarations by Dr. Grunbaum, amicus here.

Dr. Grunbaum, a criminalist and biochemist,^{4/} had testified that the

4. Dr. Grunbaum holds a Ph.D. degree in biochemistry and a master's degree in criminology with a specialty in forensic identification. He has been employed by the University of California as a research biochemist for 30 years, specializing in analytical biochemistry and microanalysis, which includes the examination of body fluids. (Washington, supra, 622 P. 2d at p. 989.) He is a leader in the development of electrophoresis to test body-fluid enzymes for purposes of forensic identification, and is an author of the most-cited studies on the distribution of enzyme and antigen phenotypes in the population. (See Grunbaum et al., Distribution of Gene Frequencies and Discrimination [Fn. continued])

Multi-System, and electrophoretic testing of dried stains in general, are unreliable. As a long-time forensic researcher at the University of California, he had participated in initial stages of the Multi-System project, but had later withdrawn. The court noted Stolorow's testimony that Dr. Grunbaum's line of research in the use of a particular gel medium had not proven fruitful and had been rejected. (P. 990.) In particular, it found meritless Dr. Grunbaum's assertion that the enzyme EAP degrades rapidly in dried stains, accepting Stolorow's contrary testimony in that regard. (Pp. 991-993.)

Probabilities for 22 Human Blood Genetic Systems in Four Racial Groups (1980)
25 J. Forensic Sci. 428; Grunbaum et al., Frequency Distribution and Discrimination Probability of Twelve Protein Genetic Variants in Human Blood as Functions of Race, Sex, and Age (1978) J. Forensic Sci. 577.)

offering the evidence has the burden of proving in the trial court that a consensus of scientific opinion has been achieved. (Shirley, supra, 31 Cal.3d at p. 54.)

The prosecution did present testimony by Springer and Andrus that the tests they had used were accepted and reliable. However, the People do not seriously contend that this showing was sufficient. Indeed, it fell short under several of the criteria discussed in Kelly and Shirley. Springer and Andrus were competent and well-credentialed forensic technicians, but their identification with law enforcement, their career interest in acceptance of the tests, and their lack of formal training and background in the applicable scientific disciplines made them unqualified to state the view of the

relevant community of impartial scientists. (Kelly., supra, 17 Cal.3d at pp. 38-40.) Moreover, neither witness backed up his or her opinion with a discussion of the relevant scientific literature. (See Shirley, supra, 31 Cal.3d at pp. 55-56.)

Portions of their testimony actually supported defendant's claim that procedures for testing forensic samples vary substantially from laboratory to laboratory (even from analyst to analyst), with little attention to scientific confirmation of reliability. Springer and Andrus also conceded that aged, dried, or contaminated samples could produce misleading results, but they did not explain how their test procedures overcame these dangers. The trial record was patently inadequate to

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establish scientific acceptance of the tests under Kelly/Frye.

In order to end case-by-case controversy over the acceptance of a particular technique, we have occasionally reviewed the scientific literature ourselves in an effort to determine whether a fair consensus on reliability exists. Shirley is the most notable example. (31 Cal.3d at p. 56 et seq.)

The People and their amicus, the California District Attorney's Association, warn against such a course here. They urge that the subject matter is too technical and the relevant literature too vast to be assimilated by lay judges lacking the assistance of qualified expert witnesses. Hence, they contend, the result in this case should stand or fall on the trial record, leaving the issue for further development

in the trial courts. Under the circumstances, we find wisdom in this view.

We recognize that Kelly/Frye does not demand judicial absorption of all the relevant literature, nor does it require a decision once and for all whether a particular kind of scientific evidence is reliable. The court need only conduct a "fair overview" of the subject, sufficient to disclose whether "scientists significant either in number or expertise publicly oppose [a technique] as unreliable." (Shirley, supra, 31 Cal.3d at p. 56.)

Often, however, the technical complexity of the subject matter will prevent lay judges from determining the existence, degree, or nature of a scientific consensus or dispute without the interpretive assistance of qualified

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live witnesses subject to a focused examination in the courtroom. It is for this reason that Kelly/Frye properly emphasizes the record made in the trial court.

In Shirley., the scientific issue was relatively simple -- the long-known tendency of hypnosis to create undetectable and unshakeable false memories, despite the best intentions of both hypnotist and subject. The experts had responded to that danger in straightforward terms, permitting this court to conclude that "major voices in the scientific community [absolutely] oppose the use of hypnosis to restore the memory of potential witnesses. . . ." (Ibid.)

Here, both the technical problem and the state of current scientific opinion are more difficult to

comprehend. Electrophoretic typing of human fluid stains is a relatively recent development. (See, e.g., Baird, The Individuality of Blood and Bloodstains (1978) 11 J.Canadian Forensic Sci. 83, 103; see also People v. Young, supra, 340 N.W.2d 805, 812.) The number of proteins and enzymes theoretically subject to classification is substantial. Each substance apparently has a somewhat different reaction to adverse environments and conditions, and the effects in each case are not yet fully known.

It does appear that aged or contaminated stains can undergo actual chemical conversions, resulting in spurious or "false positive" test results. (See, e.g., Sensabaugh et al., Genetic Markers in Semen III: Alteration of Phosphoglucomutase Isoenzyme Patterns

in Semen Contaminated with Saliva (1980)
25 J.Forensic Sci. 470, 476-477; Kind et
al., An Investigation into the Possible
Sources of Adventitious ABH Substances
in Bloodstain Grouping (1976) 16
J.Forensic Sci.Society 155, 160; Periera
et al., Problems Involved in the
Grouping of Saliva, Semen, and Other
Body Fluids (1976) 16 J.Forensic Sci.
Society 151, 152; Jenkins et al., The
Problem of the Acquired B Antigen in
Forensic Serology (1972) 12 J.Forensic
Sci.Society 597, 600, 602.) Moreover, the
electrophoretic method itself is
apparently performed under substantial
chemical and electrical variations, and
considerable training and experience are
necessary to interpret the visual
results.

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The People respond with opinions by certain scientists that proper methodology and experienced professional judgment can ensure that any typing results reported will be reliable. (E.g., Sensabaugh, Response to the Misapplication of Genetic Analysis in Forensic Science (letter to the edit.) (1984) 29 J.Forensic Sci.Society 12, 15; Culliford, The Examination and Typing of Bloodstains in the Crime Laboratory (1971) p. 75.) It is not clear from our unaided review of these authorities that impartial science has developed a consensus on the crucial issue: whether for the typing categories (ABO, PGM, Peptidase-A) and body fluids (semen, blood, saliva, vaginal secretion) at issued here, current methodology, employed by qualified technicians, can discriminate reliably between testable and

untestable samples and between accurate
and inaccurate results.

We do not suggest that such a consensus is lacking. We simply conclude that the answer must abide an adequate future trial record made with the help of live witnesses qualified in the applicable scientific disciplines. We therefore do not foreclose future attempts to admit stain-typing evidence based on a foundation such as we have described. (See Kelly, supra, 17 Cal.3d at pp. 40-41.)^{5/} In this case, such a

5. We recognize that defendant's amicus' Dr. Grunbaum, is himself a well-credentialed forensic scientist who has pioneered in the development of electrophoretic techniques. (See fn. 4, ante.) His record of opposition to their forensic use under current conditions is well-established. An addition to his brief in this case, we judicially notice his testimony in other trials that the visual subjectivity of the electrophoretic process, and the possibility that aging or contamination will cause type

[Fn. continued]

record not having been made, the evidence should not have been admitted.

We find, however, that the error was harmless in light of the overwhelming valid evidence against defendant. In a supplemental brief on the Kelly/Frye issue, defendant

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conversions and spurious results, render forensic tests for ABO and PGM types in crime-scene stains highly suspect. (E.g., State v. Washington, supra, 622 P.2d 986, 989-992; see also People v. Williams, S.F. Super. Ct. action No. 110047 [proceedings of Dec. 8, 1983].) Arguably his public opposition alone is "significant [enough] in . . . expertise" to establish a legitimate scientific dispute. (See Shirley, supra, 31 Cal.3d at p. 56.) However, it is not clear that Dr. Grunbaum's views are widely shared in degree, and we are reluctant to rely on a single opinion, however respectable, to foreclose all further evidence on the issue of scientific acceptance. (See Kelly, supra, 17 Cal.3d at p. 37.)

argues that the 10-hour jury deliberation suggests the jurors perceived a close case. The undue weight of invalid "scientific" evidence, he urges, was therefore prejudicial.

We are not persuaded by cases defendant cites for the proposition that long jury deliberations indicate prejudice. In *People v. Rucker* (1980) 26 Cal.3d 368, defendant had presented an "excellent" diminished capacity defense, which his statements at an improper booking interview directly undermined. (P. 391.) In *People v. Woodard* (1979) 23 Cal.3d 229, prior convictions were used improperly to impeach a defense eyewitness on identity; the only contrary evidence on identity was a second eyewitness called by the prosecution. (P. 341.)

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In neither case was the length of jury deliberations the sole oasis for finding prejudice. Here, despite the virtually unimpeachable prosecution case, the jury may simply have sifted the evidence with special care in light of the capital implications of a guilt verdict. It is not reasonably probable that the stain-test evidence affected the outcome. (Watson, supra, 46 Cal.2d at p. 836.)

D. Statistical use of stain-typing evidence.

Defendant suggests that, aside from the reliability of the stain-test results, it was error to permit testimony that the tests placed him within a relatively small percentage of the black population (1.2 percent according to Springer) who could have deposited the stains. He urges that admission of statistics suggesting a mathematical

"probability of guilt" misleads the jury and deprives an accused of his right to be acquitted upon a reasonable doubt.

(See *People v. Collins* (1968) 68 Cal.2d 319, 329-330.)

Since we have already concluded that the test results themselves were inadmissible on this record, we need not address the merits of defendant's claim.^{6/} We must simply determine whether the statistical use of the test results rendered prejudicial the otherwise harmless error in their admission. We

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6. We note, however, that both California and the majority of other jurisdictions have traditionally admitted statistical blood-group evidence of this kind in criminal cases, even where it simply includes the accused within the class of possible donors. (See *Lindsey*, supra, 84 Cal.App.3d at pp. 863-866, and cases cited; *Vallez*, supra, 80 Cal.App.3d at p. 56; see generally Annot. (1980) 2 A.L.R.4th 500, 511 et seq.)

We conclude it did not. As we have indicated, the combination of valid eyewitness testimony and circumstantial evidence leaves little doubt that defendant is Susan J.'s killer. There is no substantial possibility that the statistical evidence altered the jury's verdicts.

No other claims of error are raised at the guilt and special circumstance trial, and our investigation of the record discloses none. We therefore affirm the convictions and the special circumstance finding.

IV. PENALTY ISSUES

A. Antisymathy instruction and argument.

At the penalty phase, the jury was instructed in the words of CALJIC No. 1.00 that it "must not be swayed by mere sentiment, conjecture, sympathy, passion,

prejudice, public opinion or public feeling." The prosecutor made similar arguments, both during the voir dire of jurors and at the close of the penalty case. Defendant contends that these admonishments not to consider sympathy were error which invalidate the penalty judgment.

Defendant is correct. Because of the individualized sentencing concerns inherent in the Eighth Amendment, "Federal constitutional law forbids an instruction which denies a capital defendant the right to have the jury consider any 'sympathy factor' raised by the evidence when determining the appropriate penalty. . . ." Hence, it is error to give an antisympathy instruction at the penalty phase of a capital trial.

(Lanphear, supra, 36 Cal.3d at p. 165; Easley, supra, 34 Cal.3d at p. 876.)

Our prior cases also reject the People's argument that such an instruction is vitiated by the standard admonition (CALJIC No. 8.84.1) to consider "any . . . circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (Italics added; see also § 190.3, subd. (k).) As we suggested in Easley, supra, 34 Cal.3d at p. 878, fn. 10, and Lanphear, supra, 26 Cal.3d at pp. 165-168, this ambiguous standard instruction, at least when combined with an antisympathy warning, is calculated to divert the jury from its constitutional duty to consider "any [sympathetic] aspect of the defendant's character or record," whether or not related to the offense for which he is on trial, in deciding the appropriate penalty. (See

Eddings v. Oklahoma (1982) 455 U.S. 104, 113-115., Lockett v. Ohio (1978) 438 U.S. 586, 604; Woodson v. North Carolina (1976) 428 U.S. 280, 304.)

Nor was the error harmless here. Defendant presented testimony from numerous lay witnesses and a psychologist, suggesting that he possessed a gentle and nonviolent nature disturbed only by severe psychosexual problems resulting from a difficult childhood. Friends and relatives indicated their affection for him. Defendant himself took the stand to express remorse for the prior rape of Kelly P., revealed at the penalty phase. Counsel emphasized these considerations in closing argument.

Obviously, defendant intended that this character and background evidence, though unrelated to the offense charged, be considered sympathetically by

the jury in fixing his sentence. Yet the jury had been told to consider only matters which extenuated the "crime" and to ignore sympathy. As we have previously held, the ambiguous tension between these instructions and defendant's right to sympathetic consideration of all the character and background evidence he presented requires reversal of the penalty judgment. (Lanphear, supra, 36 Cal.3d at p. 169; Easley, supra, 34 Cal.3d at pp. 878-879; People v. Robertson (1982) 33 Cal.3d 21, 54, 57-59; see Eddings, supra, 455 U.S. at p. 119 [conc. opn. of O'Connor, J.].)^{7/}

7. Defendant also challenges a second feature of CALJIC No. 1.00 as given at his penalty trial -- its admonition that the jury must render a "just verdict regardless of what the consequences of such verdict may be." (Italics added.) As defendant notes, this phraseology, like all of CALJIC No. 1.00 [Fn. Continued]

B. Constitutional challenge to asserted "mandatory" aspect of 1978 death penalty law.

Under the 1978 death penalty statute, once the defendant stands convicted of a capital crime and the jury has found one or more charged "special circumstances" to be true, the case proceeds to a penalty trial in which the jury must decide between only two

(see Easley, supra, at pp. 875-877, and fn. 6), was designed for guilt trials, at which "defendant's possible punishment is not . . . a proper matter for juror consideration" (People v. Honeycutt (1977) 20 Cal.3d 150, 157, fn. 4; see also People v. Moore (1968) 257 Cal.App.2d 740, 750.) Moreover, at the penalty phase of a capital trial, the "consequences" -- the choice between the two most extreme punishments the law exacts -- are precisely the issue the jury must decide. In this context, an instruction to ignore "consequences" can be understood by the jury in the same light as an admonition to disregard sympathy. We agree that this portion of CALJIC No. 1.00 should never be given in a capital penalty trial.

possible punishments, death or life imprisonment without possibility of parole. (§§ 190.2, 190.3). In making that determination, the statute provides that the jury shall "consider and take into account and be guided by" evidence or enumerated "aggravating and mitigating circumstances" introduced at the penalty phase or gleaned from the earlier guilt trial. In these respects the 1978 law is similar to its 1977 predecessor.

In contrast with the 1977 law, however, the 1978 statute declares that if the jury finds that "the aggravating circumstances outweigh the mitigating circumstances" it "shall" impose a sentence of death." (*Italics added.*)^{8/}

8. The relevant portion of section 190.3 provides: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall con-

Defendant argues that the statutory formula impermissibly restricts the jury's constitutional sentencing discretion in two related ways. First, defendant notes, section 190.3, subdivision (k) directs the jury to consider, as a mitigating factor, "[a]ny . . . circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime," but it does not expressly state the jury's further constitutional duty to consider in mitigation all other sympathetic evidence

sider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole."

defendant may offer about his character and background, even if it is unconnected to the charged crimes. Second, defendant argues, by its use of the term "outweigh" and the mandatory "shall", the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors. Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.^{9/}

9. We are mindful of the principles of judicial restraint which caution against premature consideration of constitutional issues, especially in the uncertain constitutional waters which surround the death penalty. (See Frierson, supra, 25 Cal.3d at po. 185-195

If we were to accept defendant's interpretation of the 1978 law, his constitutional argument would have considerable merit. Under the teaching of the United States Supreme Court, it appears that for a death penalty statute to be valid, the jury's discretion "must be suitably directed and limited so as to minimize the risk of

(conc. and dis. opn. by Mosk, J.), id, at pp. 196-199 (conc. and dis. opn. by Bird, C.J.); id, at p. 199 (conc. and dis. opn. by Tobriner, J.); see also *People v. Green* (1980) 27 Cal.3d 1, 49-50). When this court decided *Frierson*, however, the 1977 death penalty law had been in effect for only two years and had already been superseded by the 1978 law. Except for retrials, most defendants who could be tried under the 1977 law had already been tried. By contrast, the 1978 law has been on the books for seven years, and it remains the law of this state. Automatic appeals of death judgments rendered under its provisions are reaching us at the rate of approximately 30 per year.

If this court were of the view that the law is unconstitutional on its face, as defendant contends, it would

wholly arbitrary and capricious action" (Zant v. Stephens (1983) 462 U.S. 862, 874 quoting from Gregg v. Georgia (1976) 428 U.S. 153, 189 (pl. opn.)), at the same time, however, the statute must allow for the jury's "consideration of the character and record of the individual offender and the circumstances of the individual offense." (Woodson, supra, 428 U.S. at p. 304 (pl. opn.), see also Eddings, supra, 455 U.S. at pp. 111-112; Lockett, supra, 438 U.S. at p. 605 (pl. opn.); Robert v. Louisiana (1976) 428 U.S. 325, 333 (pl. opn.)). As the

certainly be our obligation to say so. While we are not of that view, we do find a potential for confusion in the law which calls for certain prophylactic instructions in future death penalty trials including any retrial which defendant may confront. (Infra, fn. 18.) Under the circumstances, it is not appropriate for this court to withhold
[Fn. continued]

Lockett plurality concluded, a procedure which "prevents the sentencer . . . from

guidance simply because defendant's death penalty judgment is being reversed on other grounds. (See § 43; People v. Ramos (1984) 37 Cal.3d 136, 150.) Defendant asserts other constitutional challenges which we do not find it necessary to confront at this time.

With all due respect to the Chief Justice, we do not understand how our decision to confront certain constitutional issues which defendant has raised "insulates" our decision on those issues from United States Supreme Court review. (See conc. & dis. opn. by Bird, C.J., post, at p. ____ .*) Our decision that the 1978 law is constitutionally valid, and that defendant may therefore be retried under its provisions, is subject to immediate review by the high court. More fundamentally, even if defendant chooses not to seek review at this time, or if the high court denies review, defendant is no worse off than if we refrained from deciding those issues. If he is sentenced to death upon retrial, his judgment of conviction will come to this court automatically for review, and if we affirm his conviction, notwithstanding his constitutional objections, he will be free to seek review from the United States Supreme Court in precisely the same manner as if we had deferred consideration of the constitutional challenge until that time

* Typed opn., at p. 1.

giving 'independent mitigating weight' to all relevant evidence proffered by the defendant for that purpose "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (438 U.S. at p. 605.)

A capital sentencing scheme can "guide" and "channel" the determination of penalty by strictly confining the class of offenders eligible for the death penalty, or by setting forth the factors society deems relevant to a penalty verdict, or both. (See, e.g., *Pulley v. Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 42], *Zant*, *supra*, 462 U.S. at pp. 875-880). But with respect to

the process of selecting from among that class those defendants who will actually be sentenced to death, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." (Zant, supra, 462 U.S. at p. 879.) (Italics in original.) It is not simply a finding of facts which resolves the penalty decision, "out . . . the juror's moral assessment of those facts as they reflect on whether defendant should be put to death" (Easley, supra, 34 Cal.3d 880, quoting People v. Haskett (1982) 30 Cal.3d 841, 863.) The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that

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it is not the appropriate penalty.^{10/}
Moreover, the decision is the responsibility of the jury and no one else. "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (Caldwell v. Mississippi (1985) ____ U.S. ____ [86 L.Ed.20 231 239].)

We agree with defendant, therefore, that a statute would be invalid if interpreted to preclude juror consideration of any factors

10. "Relevant" circumstances are those which the Constitution requires to be considered in reaching a penalty decision, or which are constitutionally permissible and must or may be considered under the terms of the death penalty statute. Sentencers' racial, religious, and political prejudices are examples of constitutionally impermissible considerations.

constitutionally relevant to imposition of the death penalty. Nor would a statute pass muster if it required jurors to render a death verdict on the basis of some arithmetical formula, or if it forced them to impose death on any basis other than their own judgment that such a verdict was appropriate under all the facts and circumstances of the individual case.^{11/} We agree with the People,

11. In *Jurek v. Texas* (1976) 428 U.S. 262, the court upheld a statute which imposed the death penalty for capital murder once the jury found beyond a reasonable doubt that the answers to three statutory questions were "yes." The questions were (1) whether the victim died as a result of deliberate conduct committed with the reasonable expectation that it would cause death; (2) whether there was a probability of future criminal violence by the defendant, and (3) if relevant, whether the killing was an unreasonable response to any provocation by the victim. The court's decision relied solely on Texas appellate decisions which interpreted question (2) to encompass consideration by the jury of all relevant mitigating evidence,

however, that the 1978 Death Penalty Law need not, and should not, be so interpreted.

While subdivision (k) of section 190.3 speaks only of a "circumstance which extenuates the gravity of the crime," this court in Easley, supra, 34 Cal.3d at p. 878, fn. 10, imposed a prospective requirement that "trial courts -- in instructing on the factor embodied in section 190.3, subdivision (k) -- should inform the jury that it may consider as a mitigating factor 'any other circumstance which extenuates the

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including general character and background. (Pp. 272-274.) Implicit in Jurek is the notion that the jury could act on such evidence, answer question (2) "no," and thus reject the death penalty if it believed under all the circumstances that death was not the appropriate punishment for the particular offense and offenders (See discussion, post.)

gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (Lockett, supra, 438 U.S. at p. 604.) In doing so, we necessarily determined that the statutory language is susceptible to that clarification. Indeed, we noted that in Frierson, supra, 25 Cal.3d at p. 178, which dealt with identical language in the 1977 law, we had "apparently viewed [the phrase 'any other circumstance which extenuates the gravity of the crime'] as an open-ended, catchall provision, allowing the jury's consideration of any mitigating evidence." (Easley, supra, 34 Cal.3d at p. 878.) We see no principled basis for holding, so late in the day,

that the 1978 law invalidly excludes jury consideration of evidence of this kind.

Similarly, the reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k"

as we have interpreted it.^{12/} By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is

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12. The mere fact that a statute requires the sentencer to "weigh" aggravating against mitigating circumstances, or to determine which "outweigh" the others, does not render the law invalid. (See *Proffitt v. Florida* (1976) 428 U.S. 242, 251-253, reh'g. den. sub nom. *Gregg*

appropriate in the particular case.^{13/}

13. "Aggravating and "mitigating" are not defined by the statute. However, we see no statutory intent to require death if the jury merely finds more bad than good about the defendant and to permit life without parole only if it finds more good than bad. At a capital penalty trial, defendant has already been convicted of committing, without legal excuse, an intentional first degree murder with at least one "special circumstance" necessary to make him eligible for the death penalty. Often a person in this situation will have a substantial history of criminal and anti-social behavior. It would be rare indeed to find mitigating evidence which could redeem such an offender or excuse his conduct in the abstract. Recognizing this, the statute requires at a minimum that he suffer the penalty of life imprisonment without parole. It permits the jury to decide only whether he should instead incur the law's single more severe penalty -- extinction of life itself. (§ 190.3.) It follows that the weighing of aggravating and mitigating circumstances must occur within the context of those two punishments; the balance is not between good and bad but between life and death. Therefore, to return a death judgment, the jury must be persuaded that the "bad" evidence is so substantial in comparison with the "good" that it warrants death instead of life without parole.

This view is reinforced by examination of general language in the 1978 law. For example, section 190.3 provides that, with narrow exceptions, "evidence may be presented by both the People and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to" the circumstances of the current offense, prior felony convictions or violent crimes, "and the defendant's character, background, history, mental condition and physical condition."

(Italics added.) In deciding whether the aggravating circumstances outweigh the mitigating, the jury must consider, among other things, "all of the evidence" and "the arguments of counsel."

As Justice Stevens noted in his concurring opinion in *Barclay v. Florida* (1983) 463 U.S. 939, rehearing denied,

464 U.S. 874, the Florida courts have imposed a similar construction on that state's somewhat analogous "weighing" statute. Under the scheme applicable to defendant Barclay, once a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He may impose death if satisfied in writing "(a) [t]hat

sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (Id., subd. (3).) If the jury recommends life, the facts suggesting a death sentence "should be so clear and convincing that virtually no reasonable person could differ." (Tedder v. State (Fla. 1975) 322 So.2d 908, 910.)

"Shortly after the enactment of the current statute, the Florida Supreme Court explained:

' . . . [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present. . . .'
[Citations omitted.]"

(Barclay, supra, 463 U.S. at p. 963 [conc. opn. of Stevens, J.], quoting State v. Dixon (Fla. 1973) 283 So.2d 1, 10, cert. den. sub nom. Hunter v. Florida (1974) 416 U.S. 943; see also Proffitt, supra, 428 U.S. at p. 251; but see Cooper v. State (Fla. 1976) 336 So.2d 1133, 1142, cert. den. (1977) 431 U.S. 925.)^{14/}

14. At least one other state supreme court has interpreted a somewhat similar statute to clarify the jury's fundamental sentencing discretion. North Carolina's death penalty law requires the sentencer to find (1) whether any statutory aggravating circumstances exist, (2) whether they are "sufficiently substantial" to call for the death penalty, and (3) whether any one or more mitigating circumstances "outweigh: the aggravating circumstances. "Based on these considerations," the jury must then recommend whether the defendant should receive death or life imprisonment. (N.C. Gen.Stat. (Cum.Supp. 1981) § 15A-2000m subds. (b), (c).) In State v. McDougall (1983) 301 S.E. 2d 308, the North Carolina Supreme Court affirmed that, if questions, (1) and (2) were answered "yes" and question (3) was answered "no," the jury had a duty to [Fn. continued.]

The 1978 California initiative does, of course, represent a change from its 1977 predecessor; the 1978 law tells

recommend death. (Pp. 323-324; see also State v. Pinch (N.C. 1982) 292 S.E.2d 203, 226-227, cert. den., 459 U.S. 1056.) However, the court indicated, in answering the statutory questions, the jury "must be satisfied that the sentence is justified and appropriate upon considering the totality of the aggravating circumstances with the totality of the mitigating circumstances [¶] The jury is not required to assign a value to the aggravating circumstances, subtract from it the value of the mitigating circumstances, and look to the remainder to determine if that value is sufficiently substantial to deserve the death penalty. We reject and disapprove such a mechanical mathematical approach to the decision of life or death." (301 S.E.2d at p. 326.)

McDougall found "instructive" the Utah Supreme Court's analysis in State v. Wood (1982) 648 P.2d 71. Utah's statute provided only that the sentencer should "consider" the proper penalty in light of specific aggravating and mitigating circumstances, but Wood deemed it "implicit in the statutory scheme that a comparison of aggravating and mitigating factors must be made and a decision reached on the result of the comparison. . . ." (P. 79.) In conducting the weighing process, the Wood court said, "the sentencing body

the jury to decide the appropriate
punishment by weighing certain factors,

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[must] compare the totality of the mitigating against the totality of the aggravating factors, not in terms of the relative numbers of the aggravating and the mitigating factors, but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the aggravating factors. . . ." (P. 83, quoted in McDougall, supra, 301 S.E.2d at p. 327; see also Pinch v. North Carolina (1982) 459 U.S. 1056 [opn. of Stevens, J. on denial of cert.] .)

McDougall upheld the death judgment there at issue against claims that the jury had not been adequately instructed about the scope of its sentencing discretion. As the court noted, the jury was told, among other things, that "you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. Your weighing should not consist of merely adding up the number of aggravating circumstances and mitigating circumstances. Rather you must decide from all the evidence what value to give to each circumstance and then weigh the aggravating circumstances, [Fn. continued.]

while the 1977 version asked only that the sentencer "consider, take into account and be guided by" the factors listed. But this amendment does not rob the jury of its constitutional responsibility to decide what penalty is appropriate under all the relevant circumstances. It simply makes clear that, in resolving the ultimate issue of punishment under the 1978 law, the

so valued, against the mitigating circumstances, so valued, and finally determine whether the aggravating circumstances outweigh the mitigating circumstances." Jurors were also instructed that "you may consider any circumstance from the evidence which you are satisfied lessens the seriousness of the murder or suggests a lesser penalty than otherwise may be required, such as the defendant's character, education, environment, habits, mentality, propensities and record, and any other circumstances arising from the evidence which you deem to have mitigating value. . . ." (301 S.E.2d at pp. 324-325.) These instructions were neither directly derived from, nor expressly required by, the statutory language.

jurors are to limit their consideration to "the specific factors listed in the statute, . . ." (People v. Boyd (1985) 38 Cal.3d 762, 773.)^{15/} Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole.

This construction of the 1978 law honors the plain language of section 190.3. It also explains the most likely "constitutional" intent of the drafters

15. As we explained in Boyd, supra, the drafters of the 1978 initiative may have believed the 1977 law was unconstitutional if, by requiring the jury only to "consider" the factors listed in the statute, it implied that the sentencer actually was free to determine the penalty on any basis it chose. Such fears, plausible in 1978, were later laid to rest by the United States Supreme Court. (Boyd, supra, at pp. 773-774, fn. 5; see Zant, supra, 462 U.S. at p. 875.)

and avoids the constitutional difficulties of a finding that the statute permits "mandatory" death penalties.^{16/} We conclude that the 1978 law is not invalid

16. In Easley, this court ruled that it was prejudicial error to give the 1978, or "mandatory death penalty," version of CALJIC No. 8.84.2 in a case properly tried under the 1977 law, since a defendant "is . . . generally worse off under [the mandatory feature of] the 1978 law." (34 Cal.3d at pp. 88a-884 *italics added*.) Our discussion assumed that the 1978 version of section 190.3 intended to require the death penalty in certain cases. No extensive analysis was provided, however, and the statutory interpretation was not necessary to our decision. Certainly the 1978 instruction given in Easley was prejudicial when compared to its 1977 counterpart, since the latter, unlike the former, contained no unexplained use of mandatory language. (See discussion, post.) Easley itself recognized that, even if statutory language was susceptible to a liberal saving construction, instructions given in the literal statutory language might nonetheless be deficient. (P. 878, and fns. 8, 10; see discussion, ante.) Nothing in Easley precludes us from holding that the 1978 statute permits the jury to reject death if persuaded by any evidence that it is an inappropriate penalty.

on grounds that it withdraws constitutionally compelled sentencing discretion from the jury.^{17/}

C. Other penalty phase issues.

Defendant makes three remaining contentions. He urges that certain

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17. We acknowledge that the language of the statute, and in particular the words "shall impose a sentence of death," leave room for some confusion as to the jury's role. Indeed, such confusion is occasionally reflected in records before this court. For that reason, trial courts in future death penalty trials --in addition to the instruction called for by Easley, supra, 34 Cal.3d at p. 878, fn. 10 -- should instruct the jury as to the scope of its discretion and responsibility in accordance with the principles set forth in this opinion. We pass no judgment here upon the validity of death penalty verdicts previously rendered without benefit of the Easley instruction or the instruction we now require. Each such prior case must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law.

testimony by the victim's father at the guilt phase was improperly calculated to arouse jury passions on the issue of penalty. He points to prosecutorial comments that he could take the stand to evoke jury sympathy without discussing his offense.^{18/} and that the trial judge denied his automatic motion for modification of the death verdict without providing the required statement of reasons. (§ 190.4, subd. (e).) We deem it unnecessary to discuss these issues, since they are unlikely to recur in any penalty retrial.

18. Defendant testified at the penalty phase, expressing remorse for the prior rape and asking the jury for mercy, under a prior trial court ruling that he could do so without exposing himself to examination on the circumstances of the instant crimes.

V. CONCLUSION

The judgment as to guilt, and the finding of a special circumstance, are affirmed. The penalty judgment is reversed.

GRODIN, J.

WE CONCUR:

BROUSSARD, J,

REYNOSO, J.

KAUS, J.*

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

C O P Y

PEOPLE v. ALBERT GREENWOOD BROWN, JR.

Crim. 22501

CONCURRING AND DISSENTING OPINION BY
MOSK, J.

I concur in the affirmance of the defendant's guilt, in the finding of special circumstances and in parts IV B and C of the majority opinion, but I must dissent from the reversal of the penalty judgment as provided in part IV A of the opinion.

Had there been several grounds requiring reversal of the penalty, I would have considered concurring under compulsion of People v. Lanphear (1984) 36 Cal.3d 163, and People v. Easley (1983) 34 Cal.3d 858. However, because the majority's only basis for reversal is the giving of the standard instruction advising the jury against being swayed

by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" (CALJIC No. 1.00), I must once again urge they are in error.

Rather than repeat my analysis of that commonly given instruction, I refer to the reasons expressed in my dissents in *People v. Bandhauer* (1970) 1 Cal.3d 609, 619, Lanphear, supra, 36 Cal.3d at page 169, and Easley, supra, 34 Cal.3d at page 886.

I would affirm the judgment in its entirety.

MOSK, J.

C O P Y

PEOPLE v. BROWN

Crim. 22501

CONCURRING AND DISSENTING OPINION BY
LUCAS, J.

I concur in the judgment to the extent it affirms defendant's murder conviction and the finding of special circumstances.

I likewise concur in the majority's conclusion that the 1978 death penalty law is constitutional.^{1/} Under

^{1/} I also fully concur with the majority's decision to reach the constitutional issue at this time. The 1978 death penalty law has been "on the books" for nearly seven years and has produced approximately 170 judgments of death currently on appeal with this court. New trials are commencing daily. Accordingly, the trial courts throughout the state, as well as the trial court which will retry this defendant, sorely need to know of any constitutional defects we discern in the 1978 law or the jury instructions based thereon. In my view, it would be most unfortunate for

that law, as the majority recognizes, the sentencer (whether judge or jury) is expressly directed to consider all mitigating or extenuating evidence presented at trial. (See Pen. Code, § 190.3, subd. k, People v. Frierson (1979) 25 Cal.3d 142, 178.) Thus, defendant's contention that the 1978 law fails to permit full consideration of mitigating circumstances is meritless. Similarly, the majority properly rejects the argument that the 1978 law constitutes an invalid mandatory sentencing scheme. Under our law, the sentencer has broad discretion to consider the various aggravating and mitigating factors and to base the penalty

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the bench, the bar, the people of this state, and the defendant himself, were we to continue to withhold such guidance merely because the defendant's conviction must be reversed on some other ground.

decision upon a weighing of those factors. Although the law provides that the sentencer "shall" choose a death sentence when the aggravating circumstances outweigh the mitigating ones, ample sentencing discretion is preserved by the breadth of the weighing process itself.

I am troubled, however, by the suggestion or implication in the majority opinion regarding the possible insufficiency of the jury instructions which heretofore have been given in capital cases. Appeals are presently pending in our court involving approximately 170 judgments of death, most of which were rendered on the basis of identical, standardized jury instructions. (See CALJIC Nos. 8.84.1, 8.84.2.) The majority herein suggests that these instructions (based on the very language of the 1978 death penalty law which the majority finds

constitutional), "leave some room for confusion as to the jury's role."

(Ante, p. ___, fn. 18 [maj. opn. at p. 49].) Accordingly, the majority directs the trial courts in future death cases to supplement these instructions and clarify the scope of the jury's discretion and responsibility. (Ibid.) Ominously, the majority elects to "pass no judgment here upon the validity of death penalty verdicts previously rendered without benefit" of such clarifying instructions. (Ibid.) The majority calls for a case-by-case analysis to determine whether in a particular case "the sentencer may have been misled to defendant's prejudice. . . ." (Id., at p. ___, fn. 18 [maj. opn. at pp. 49-50].)

We would place an intolerable and unjustified burden upon the judicial system were we to reverse 170 death

penalty judgments merely because of possible "confusion" regarding the meaning of standardized jury instructions which, in my view, are sufficiently clear to guide the jury in its penalty determination. It is conceivable, of course, that in a particular case the record will establish that, by reason of the language of the 1978 law, or instructions based thereon, a particular judge or jury clearly misunderstood and misapplied its sentencing responsibilities. Such a case seemingly would be quite rare, and on a silent record we must presume that the sentencer properly discharged its statutory duties. Reversible error could not be posited solely upon mere prosecutorial argument misstating the nature of the sentencing process, at least in the absence of some affirmative indication that the jury was thereby misled.

Moreover, a defendant's failure to object to such an argument or to request an appropriate admonition would prevent our consideration of any asserted error or misconduct. (People v. Green (1980) 27 Cal.3d 1, 27.)

Aside from these substantial reservations or misgivings regarding the effect of today's decision upon the 170 automatic appeals now pending before us, I concur with the majority opinion's constitutional analysis.

I dissent, however, to the reversal of the penalty of death under People v. Lanphear (1984) 36 Cal.3d 163, 166, and People v. Easley (1983) 34 Cal.3d 858, 876. For the reasons stated by Justices Mosk and Richardson in their dissenting opinions in those cases, I believe that any error in cautioning the

- A-98 -

penalty jury not to be swayed by "sympathy" for the defendant is, at worst, harmless error. Accordingly, I would affirm the judgment in its entirety.

LUCAS, J.

C O P Y

PEOPLE v. ALBERT GREENWOOD BROWN, JR.

Crim. 22501

CONCURRING AND DISSENTING OPINION BY
BIRD, C.J.

I concur only in the judgment.
I write separately to underscore my misgivings about the majority's use of a procedure which insulates from review by the United States Supreme Court our decision on the constitutionality of two important aspect of the 1978 Briggs Initiative.

It is troubling that a case with clear penalty phase error is being used as the lead case to pass on the constitutionality of the 1978 death penalty law. While my colleagues "are mindful of the principles of judicial restraint which caution against premature consideration of constitutional issues"

(maj. opn., ante, at p. ____ [typed maj. opn at p. 36], fn. 9), nevertheless they proceed to rule on the constitutionality of Penal Code section 190.3, subdivision (k) and the so-called "mandatory" aspect of the 1978 law, on the ground that it would not be "appropriate for this court to withhold guidance simply before defendant's death penalty judgment is being reversed on other grounds." (Maj. opn., ante, at p. ____ [typed maj. opn at p. 36, fn. 9].)

Such a procedure, of course, violates this court's own cautions that "we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us." (People v. Williams (1976) 16 Cal.3d 663, 667.) Moreover, engaging in such judicial commentary in a case where the court reverses the death sentence on other

grounds will, as a practical matter, effectively insulate the substance of appellant's federal constitutional challenges from United States Supreme Court review. (See People v. Frierson (1979) 25 Cal.3d 142, 197 (conc. opn. of Bird, C.J.).) I see no reason for reaching out and construing the statute at this point and violating "not only honored tenets of judicial restraint but also sound principles of federalism." (Ibid.)

A majority of this court declined to pass on the constitutionality of the 1977 death penalty law in Frierson, supra, 25 Cal.3d at pages 188-196 (conc. opn. of Mosk, J. and Newman, J.), 196-199 (conc. opn. of Bird, C.J.), and 199 (conc. opn. of Tobriner, J.), and in People v. Green (1980) 27 Cal.3d 1, 49-50. As Justice Mosk explained in Frierson, the

constitutionality of the law under the federal character "can finally be decided, whether by this court or by the United States Supreme Court, only when there is presented on appeal an otherwise unimpeachable judgment of death. Until such a judgment is before us for review we cannot determine whether the legislation in question was constitutionally applied; and until then I also deem it appropriate to withhold a final decision on whether -- and if so, how -- that legislation can reasonably be construed to be constitutional on its fact." (25 Cal.3d at p. 195.) Those thoughts are fully applicable here.^{1/}

^{1/} The majority also rely on People v. Ramos (1984) 37 Cal.3d 136, 150 to justify their actions. Yet Ramos concerned only one aspect of the 1978 law -- the "Briggs commutation instruction" -- which had been dealt with in an earlier opinion by this court that was reversed and remanded by the United States Supreme

My colleagues do not intimate -- nor am I able to discern -- what prompts the conclusion that after seven years of silence on these subjects, it suddenly becomes "inappropriate" to withhold judgment on issues which are unnecessary for resolution in this case. If this court intended to rely on such reasoning to make bold advisory pronouncements on the constitutionality of the 1978 law, the time for doing so was soon after its passage, either in one of the first automatic appeals arising under the

Footnote 1 continued:

Court. Nothing in Ramos condoned the practice of issuing an advisory opinion on the constitutionality of several aspects of the 1978 law. On the contrary, in Ramos this court noted that in light of the reversal of the special circumstance finding and ensuing penalty verdict, "there [was] no need to address the bulk of the penalty phase issues raised by defendant." (37 Cal.3d at p. 150.)

1978 law or in a properly presented
pretrial writ petition. (See, e.g.,
Rockwell v. Superior Court (1976) 18
Cal.3d 420, 424, 427-428 [1973 capital
punishment law found unconstitutional].)

Bird, C.J.

APPENDIX B

C O P Y

[Filed January 30, 1986]

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

Y.

ALBERT GREENWOOD BROWN,

Respondent and Appellant.

Crim.
22501

MODIFICATION OF OPINION

BY THE COURT:

The petition for rehearing is denied. The opinion is modified to add a new footnote number 19 at the end of the opinion at 40 Cal.3d 512, 546, to read as follows:

"The parties and other persons have asked us to adopt a specific jury instruction to guide the jury's determination of the penalty in future capital

cases. We have been advised that the Committee on Standard Jury Instructions, Criminal has drafted a proposed instruction to be inserted into CALJIC 8.84.2. It directs the jurors that:

"The weighing of aggravating and mitigating circumstances does not mean a mere mechanical weighing of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment

of death, each of you must be persuaded that the aggravating evidence [circumstances] is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'

"We do not adopt the exact language of this instruction, which, in any case, is subject to revision by CALJIC before it is finally adopted. By way of guidance to the trial courts, however, we believe it appropriate to state that this language, if inserted to replace the language in the current third paragraph of CALJIC 8.42.2 (which says that if aggravating circumstances outweigh mitigating circumstances the jurors 'shall' return a verdict of death), would conform to our opinion."

Supreme Court U.S.

FILED

APR 18 1986

JOSEPH F. SPANGLER
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
Petitioner,)
)
v.)
)
ALBERT GREENWOOD BROWN, JR.,)
)
Respondent.)

ON PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION AND
MOTION TO PROCEED IN FORMA PAUPERIS

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12-12

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Petitioner,)
)
 v.)
)
 ALBERT GREENWOOD BROWN, JR.,)
)
 Respondent.)

ON PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, ALBERT GREENWOOD BROWN, Jr., respectfully requests that this Court deny the petition for a writ of certiorari.

A. Introduction

Petitioner seeks certiorari attacking the California Supreme Court's resolution of two issues: the propriety of giving an anti-sympathy instruction to a jury at the penalty trial of a capital case and the propriety of instructing the jury that if aggravating circumstances outweigh mitigating circumstances they "shall" impose death. The former issue, however, does not raise any important federal question; and

1.

the latter issue is not relevant to the determination of the case.

B. The Mitigating Evidence and the Instruction

The jury herein was instructed not to consider sympathy in deciding between life and death for respondent. (CT 319; RT 6559.)^{1/} Following state precedent, the California Supreme Court held that such an instruction is not appropriate at the penalty phase of a capital trial. (People v. Brown, 40 Cal.3d 512, 536 (1985).)

In holding it was error to instruct the jury to disregard sympathy, the California Supreme Court did cite United States Supreme Court authority. (Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).) Such an instruction, however, was established as error in California long before Eddings, Lockett, and Woodson were decided. (People v. Bandhauer, 1 Cal.3d 609, 618-619 (1970); People v. Polk, 63 Cal.2d 443, 451 (1965); People v. Friend, 47 Cal.2d 749, 767-768 (1957).) Although the California Supreme Court has noted that the Bandhauer, Polk, and Friend results have been reinforced by Eddings, Lockett, and Woodson (People v. Easley, 34 Cal.3d 858 (1983)), that suggests only that California is respecting the bounds of federal law and does not mean the state rule is no longer viable independent of what the federal rule may be. Indeed, in its continued reliance on Bandhauer, the California Supreme Court has implicitly indicated its reliance on a state rule which predates and is independent of any federal rule. Under such circumstances, this Court should not view the citation of federal authority as the reliance on

1. Respondent will use the same citation form to the record as petitioner has; "CT" refers to the Clerk's Transcript, and "RT" refers to the Reporter's Transcript.

2.

federal law only. (See Delaware v. Van Arsdall, ___ U.S. ___ (April 7, 1986), Stevens, J., dissenting.)

Petitioner attacks the holding of the California Supreme Court, arguing it is appropriate to remove sympathy from the jury's consideration. Petitioner, however, has framed the issue more narrowly than either the facts of the case or the California Supreme Court's opinion justifies. The real issue here is whether the jury was advised it could consider the mitigating evidence presented by respondent.

In recent years the California Supreme Court has discussed and refined the scope of discretion held by the jury at a penalty trial. The court has held that the Constitution requires and the state statute allows consideration of evidence relative to the defendant's character and background and the sympathetic response that evidence may evoke. (People v. Easley, supra, 34 Cal.3d 858.) In the present case, the California Supreme Court evaluated the jury instructions which implement the statute and found them defective. In doing so, the court interpreted state instructions meant to carry out the directive of a state statute. Whether or not the instructions are flawed under federal constitutional law, they are flawed under state law as failing to implement the state statute as interpreted by the state high court. The interpretation of the statute and the implementing instruction is a matter solely for the state court.

A review of the evidence and the instructions in this case reveals the jury was precluded from considering the mitigating evidence presented by respondent.

At the penalty trial, respondent produced evidence from relatives indicating respondent had been a quiet, passive, sometimes troubled child. (RT 6240, 6261, 6273, 6290.) A psychiatrist testified respondent suffered from severe

difficult childhood and education. (RT 6402- testified he was and he asked the jury 00, 6507.) It cannot, dent had a right to ddings v. Oklahoma, , supra, 438 U.S.

tand their right to that right in instructions follows:

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psychosexual problems resulting from a difficult childhood and a grossly inadequate and misleading sex education. (RT 6402-6414.) Additionally, respondent himself testified he was ashamed of his prior criminal conduct, and he asked the jury to show mercy for him. (RT 6494, 6498-6500, 6507.) It cannot, at this late date, be doubted that respondent had a right to have the jury consider this evidence. (Eddings v. Oklahoma, supra, 455 U.S. 104, 114; Lockett v. Ohio, supra, 438 U.S. 586, 604.)

The jury, however, would understand their right to consider the evidence only if advised of that right in instructions. Here the jury was instructed as follows:

"The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under a special circumstance has been specially found to be true.

"It is the law of this State that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the State Prison for life without possibility of parole in any case in which the special circumstance charged in this case has been specially found true.

"Under the law of this State, you must now determine which of said penalties shall be imposed on the defendant.

"You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

"Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

"In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

- "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
- "(c) The presence or absence of any prior felony conviction.
- "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- "(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- "(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
- "(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
- "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental distress or defect or the effects of intoxication.
- "(i) The age of the defendant at the time of the crime.
- "(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
- "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

"After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

"However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose the sentence of confinement in the State Prison for life without the possibility of parole."
(CT 319-322; RT 6558-6562.)

Thus, the jury was told to restrict their consideration to factors relating to the offenses and to disregard any sympathetic feelings engendered by the evidence respondent presented. "[I]t was as if the trial judge had instructed [the] jury to disregard the mitigating evidence." (Eddings v. Oklahoma, supra, 455 U.S. 104, 114.) As this Court has held: "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." (Id., at pp. 114-115.)

Petitioner claims the list of factors the jury is allowed to consider (CALJIC 8.84.1)^{2/} was held to be consistent with Lockett and Eddings in California v. Ramos, 463 U.S. 992 (1983). That is not so. Ramos suggested that California Penal Code, § 190.3 is consistent with Lockett in that it allows the defendant to present any relevant mitigating evidence. (Id., at p. 1005, fn. 19.) The problem, of course, is that although the statute permits the introduction of evidence, the instructions do not allow for the consideration of that evidence.^{3/}

2. The California Supreme Court has interpreted CALJIC 8.84.1 as not allowing consideration of the character and background of the offender but rather restricting consideration to the circumstances of the offense. (People v. Easley, supra, 34 Cal.3d 858.) That is an interpretation of a state jury instruction promulgated by a state statute. The California Supreme Court should have the last word on such an interpretation; this Court should not get involved in interpreting California state statutes or the implementing instructions.

3. The relevant statutes in Eddings and Lockett allowed the defendants to present any mitigating evidence; this Court recognized, however, that such statutes did not necessarily allow for consideration of that evidence by the sentencer. (Eddings v. Oklahoma, supra, 455 U.S. 104, 114-115 and fn. 10.)

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court noted that juries are "unlikely to be skilled in dealing with the information they are given" at a penalty trial and recognized the importance of careful instructions to advise the jury how to evaluate evidence as it relates to the applicable law. (Id., at pp. 192-193.) Here no instruction advised the jury they could consider respondent's mitigating evidence.

It is appropriate for the jury to consider feelings of compassion or sympathy engendered by the evidence. (Woodson v. North Carolina, supra, 428 U.S. 280, 304.) Yet the instructions herein told the jury they could not consider such feelings. Petitioner contends the instruction advises the jury only to put aside feelings of "mere" sympathy. Petitioner misreads the instructions.

The instruction tells the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." Read fairly, however the "mere" modifies only sentiment and not sympathy and the other terms. If "mere" modified all the terms, the jury would be told not to consider, for example, "mere prejudice," implying prejudice itself was a proper consideration as long as it rose above the level of "mere prejudice." Such a reading, however, is absurd. The logical reading is that no prejudice, passion, or sympathy of any kind may be considered.

Petitioner suggests an anti-sympathy instruction is appropriate because Furman v. Georgia, 408 U.S. 238 (1972) requires that the penalty determination be based on factors related to the offense and the offender. California, however, has consistently rejected the concept of untethered sympathy requiring rather that sympathy be tied to the mitigating evidence. (See, e.g., People v. Easley, supra, 34 Cal.3d 858, 876.) Given the mitigating evidence respondent produced

here, any feelings of sympathy would clearly be related to the facts. Moreover, the anti-sympathy instruction was not restricted to factually untethered sympathy.

The anti-sympathy instruction here was not likely to be overlooked by the jury. The prosecutor set out from the beginning of trial to prevent any defense or mitigating use of sympathy. During voir dire he made the jurors promise they would put aside any feelings of sympathy or pity for respondent. (See, e.g., RT 553-554, 3163, 3203.) Then, after getting the trial court to agree to instruct against sympathy, the prosecutor drove the point home in his closing argument, reminding the jury of their promises and obligation not to consider sympathy. (RT 6522-6523.)

Finally, the jury here was told not to consider the consequences of their decision. (CT 319; RT 6559.) Jurors at a penalty trial, however, are supposed to act "with due regard for the consequences of their decision" (McGautha v. California, 402 U.S. 183, 208 (1971); see also Caldwell v. Mississippi, ___ U.S. ___, 86 L.Ed.2d 231 (1985).)

Jury instructions must be considered as a whole and with the presumption that jurors "attend closely to the particular language" and "carefully follow" them. (Francis v. Franklin, ___ U.S. ___, 85 L.Ed.2d 344, 360, fn. 9 (1985).) When the jury instructions herein are considered, it becomes clear that the jurors were essentially instructed to disregard the mitigating evidence that formed the basis for respondent's plea for his life. The California Supreme Court did nothing more than recognize that fact; it did not establish any new law or make any remarkable or significant interpretation of the settled law.^{4/}

4. Petitioner would have this Court believe that the decision of the California Supreme Court herein places in [fn. cont.]

C. California Penal Code section 190.3

Petitioner also seeks certiorari to review the California Supreme Court's interpretation of California Penal Code section 190.3. The California Supreme Court suggested that the standard jury instructions given at a penalty trial should be modified to make clear to the jury the scope of its sentencing discretion. (People v. Brown, *supra*, 40 Cal.3d 512, 545 and fn. 17.)

The court's comments on this issue, however, formed no part of the basis for reversing respondent's death judgment. Indeed, the court never discussed the statute or instruction as it related to respondent or his case. The California Supreme Court reversed respondent's death judgment for an entirely unrelated reason.

This Court would be rendering an advisory opinion if it sought to resolve the issue of the constitutional interpretation of California Penal Code section 190.3. In Michigan v. Long, 463 U.S. 1032 (1983), this Court held that an opinion would be advisory "if the same judgment would be rendered by the state court after we corrected its view of federal laws." (*Id.*, at p. 1042.) Since the California Supreme Court reversed respondent's death judgment for a reason unrelated to its interpretation of Penal Code section 190.3, its decision would remain unchanged even if this Court decided the state court's

4. [Fn. cont.]

jeopardy over 150 death judgments. It has been clear since 1983 that it is error to give the jury an anti-sympathy instruction. (People v. Easley, *supra*, 34 Cal.3d 858.) The instruction was not in widespread use prior to that (this case represents only the third matter that the California Supreme Court has reviewed in which the instruction was given since California reintroduced capital punishment in 1977); and presumably trial courts have followed the law since 1983 and refrained from giving such an instruction. Thus, the present decision will impact on few, if any, other death judgments.

interpretation was not required as a matter of federal law.^{5/}

Moreover, in interpreting Penal Code section 190.3, the California Supreme Court was construing a state statute. Respondent argued in the state court that an aspect of the death penalty statute and its implementing instruction was unconstitutional. The California Supreme Court rejected that challenging by recognizing that the potentially ambiguous statute was subject to interpretive clarification. (40 Cal.3d at pp. 541-542.) The interpretation adopted by the California Supreme Court was based, in part, on the perceived intent of the drafters of the statute and the plain language of the statute. (40 Cal.3d at p. 545.) That analysis will not change regardless of what this Court might say about the constitutional propriety of the statute. The state high court is free to make, as it did, its own interpretation of a state statute based on its plain meaning and apparent intent. As this Court has noted, "the inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's." (Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 362 (1932).)

5. The reversal of respondent's death judgment was based on the California Supreme Court's holding that the instructions did not allow for consideration of the mitigating evidence. Petitioner, of course, is asking this Court to review that part of the decision also. If this Court were to hold the instructions given were consistent with federal law, it would remand to the California Supreme Court for reconsideration of that issue on state grounds. At that point, the state Supreme Court would also be able to consider, if necessary, the other issues raised by respondent in his initial briefing but not considered by the court since they addressed the issue upon which reversal was granted. (See 40 Cal.3d at p. 545.) Thus, respondent's death judgment may still be reversed without regard to or consideration of the constitutional interpretation of Penal Code section 190.3.

This case does not present any federal constitutional issue "in a manner which warrants the exercise of the certiorari jurisdiction of this Court." (Murel v. Baltimore City Criminal Court, 409 U.S. 355, 357 (1972).)

D. Conclusion

For the foregoing reasons, respondent respectfully requests this Court to deny the petition for certiorari.

DATED: April 18, 1986

Respectfully submitted,

FRANK O. BELL, JR.
State Public Defender

MONICA KNOX
Chief Assistant
State Public Defender
Attorneys for Respondent

MK:a

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,)
Petitioner,)
v.)
ALBERT GREENWOOD BROWN, JR.,)
Respondent.)

ON PETITION FOR A WRIT OF CERTIORARI

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, ALBERT GREENWOOD BROWN, Jr., by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to rule 46. Respondent has at all times during the pendency of the above-referenced matter in the trial and appellate courts of the State of California been represented by appointed counsel due to respondent's indigency.

Respondent is presently incarcerated in San Quentin State Prison. His affidavit in support of this motion is attached.

DATED: April 18, 1986

Respectfully submitted,
FRANK O. BELL, JR.
State Public Defender

Monica Knox
MONICA KNOX
Chief Assistant
State Public Defender
Attorneys for Respondent

MK:a

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,)
Petitioner,)
v.)
ALBERT GREENWOOD BROWN, JR.,)
Respondent.)

DECLARATION OF
ALBERT GREENWOOD BROWN, JR.

I, ALBERT GREENWOOD BROWN, JR., being duly sworn, depose and say in support of my motion for leave to proceed in forma pauperis:

1. I am the respondent in the above-entitled matter.
2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am presently incarcerated and have been since November 1980; I receive no income from earnings and have no cash or checking or savings accounts.
3. I am unable to give security for said cause.

//
//

4. Counsel was appointed to represent me at trial,
on my direct appeal, and on these post-appeal proceedings.

Albert Greenwood Brown, Jr.
ALBERT GREENWOOD BROWN, JR.

State of California)
County of Marin) s.s.

The foregoing affidavit of
Albert Greenwood Brown, Jr., was
subscribed and sworn to before me
this 17th day of April, 1986.

Donald M. Glendon
NOTARY PUBLIC

My commission expires:



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,)
Petitioner,)
v.)
ALBERT GREENWOOD BROWN, JR.,)
Respondent.)

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the
United States Supreme Court and that I have on this date served
a copy of the Brief in Opposition and Motion to Proceed in Forma
Pauperis, by depositing said brief in the United States Mail,
postage prepaid and properly addressed to John K. Van de Kamp,
Attorney General, Jay Bloom, Deputy Attorney General, 110 West
"A" Street, Suite 700, San Diego, California 92101, and Clerk,
California Supreme Court, 4250 State Building, 455 Golden Gate
Avenue, San Francisco, California 94102.

All parties required to be served have been served.

Dated this 18th day of April, 1986, at San Francisco,
California.

Ezra Hendon
EZRA HENDON
Deputy State Public Defender
Office of the State Public Defender
1390 Market Street, Suite 425
San Francisco, California 94102

No. 85-1563

Supreme Court, U.S.

FILED

JUL 14 1986

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA
SUPREME COURT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED March 22, 1986
CERTIORARI GRANTED June 2, 1986

JOINT APPENDIX

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JA-1

CHRONOLOGICAL LIST OF DATES
ON PLEADINGS FILED; VERDICTS
AND FINDINGS RENDERED, AND
SENTENCE

SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY
OF RIVERSIDE

People v. Albert Greenwood Brown, Jr.
No. CR 18104

DATE	PROCEEDINGS
10/5/81	Amended information filed.
2/4/82	Brown is found guilty of first degree murder, special circumstances, and forcible rape as charged in the information.
2/19/82	Jury fixes the penalty on the murder conviction with special circumstances as death.
2/22/82	Brown's motion for modification of the verdict is denied.
2/25/82	Brown is sentenced to death.

[Clerk's Transcript p. 1]

Filed in Superior Court of the State of
California, in and for the County of
Riverside, October 5, 1981

DONALD D. SULLIVAN, COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

THE PEOPLE OF THE STATE OF CALIFORNIA)

Plaintiff)

v.)

ALBERT GREENWOOD BROWN, JR.)

Defendant)

Case No. CR 18104

AMENDED INFORMATION

COUNT I

The District Attorney of the
County of Riverside hereby accuses ALBERT
GREENWOOD BROWN, JR., of a violation of
Section 187 of the Penal Code, a felony,
in that on or about October 28, 1980, in
the County of Riverside, State of

JA-3

California, he did wilfully, unlawfully, and with malice aforethought murder SUSAN LOUISE JORDAN, a human being.

The District Attorney of the County of Riverside further charges that before the commission of the offense hereinabove set forth in Count I of the Amended Information, that the murder of SUSAN LOUISE JORDAN was committed by defendant(s) ALBERT GREENWOOD BROWN, JR., while the defendant(s) was engaged in the commission of, attempted commission of, and immediate flight after committing and attempting to commit the crime of RAPE in violation of Section 261 of the Penal Code, within the meaning of Penal Code Section 190.2(a)(17)(iii).

COUNT II

For a further and separate cause of action, being a different

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offense from but connected in its commission with the charge(s) set forth in Count(s) I hereof, the District Attorney of the County of Riverside hereby accuses ALBERT GREENWOOD BROWN, JR. of a violation of Section 261, Subdivision 2 and Subdivision 3 of the Penal Code, a felony, in that on or about October 28, 1980, in the County of Riverside, State of California, he did wilfully and unlawfully have and accomplish an act of sexual intercourse with a female person, to wit, SUSAN LOUISE JORDAN, not his wife, where she resisted but her resistance was overcome by force and violence and where she was prevented from resisting by threats of great and immediate bodily harm accompanied by apparent power of execution.

The District Attorney of the County of Riverside further charges that

during the commission of the above offense, the said defendant(s) ALBERT GREENWOOD BROWN, JR. inflicted great bodily injury upon SUSAN LOUISE JORDAN, within the meaning of Penal Code Section 12022.8.

FIRST PRIOR OFFENSE:

The District Attorney of the County of Riverside further charges that before the commission of the offense set forth in Count II of this Amended Information that said defendant, ALBERT GREENWOOD BROWN, JR., was on or about April 18, 1978, in the Superior Court of the State of California, for the County of Riverside, convicted of the crime of FORCIBLE RAPE, a felony, in violation of Section 261, Subdivision 3 of the Penal Code, and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction

during, a period of ten years subsequent to the conclusion of said term, within the meaning of Penal Code Section 667 6(a).

SECOND PRIOR OFFENSE:

The District Attorney of the County of Riverside further charges that before the commission of the offense set forth in Counts I and II of this Amended Information that said defendant, ALBERT GREENWOOD BROWN, JR., was on or about April 18, 1978, in the Superior Court of the State of California, for the County of Riverside, convicted of the crime of FORCIBLE RAPE, a violent felony, in violation of Section 261, Subdivision 3 of the Penal Code, and that he then served a separate term in state prison for said offense(s), and that he did not remain free of prison custody for, and did commit an offense resulting in a

JA-7

felony conviction during, a period of ten years subsequent to the conclusion of said term, within the meaning of Penal Code Section 667.5(a).

BYRON C. MORTON
District Attorney
COUNTY OF RIVERSIDE
STATE OF CALIFORNIA

By: Robert G. Spitzer
Deputy District Attorney

JA-8

Relevant Material from Reporter's
Transcript pp. 6515-6520, line 11

[Discussions Regarding Instructions
at the Penalty Phase]

THE COURT: Okay. We'll take
up anything else you wish.

MR. SPITZER: Your Honor, the
People have submitted the Court's stan-
dard form for requested Jury Instructions
and because the Court doesn't have formal
copies of the 8.84 series regarding the
penalty phase and because those
Instructions contain in them either irre-
levant language or language that the
Supreme Court has held to be
inappropriate or unconstitutional, we
have modified 8.84 and 8.84.2 to conform
with the evidence here.

The Court has previously
received the alternative verdict form,
which is Plaintiff's requested
Instruction Number 4 and in addition in

light of the testimony of the Defendant today we would ask the Court to consider giving CALJEC [sic] 2.62.

MR. MYERS: So far as the Defense is concerned, Your Honor, within the 8.84 series obviously we are not requesting any Jury Instructions on the question of penalty opposing as we do that penalty in this case.

So I think our objection can be noted.

However, assume that the Court will, in fact, give Instructions to the jury there is a modification of 8.84.2 which had previously been submitted to the Court in a Notice of Intention to seek a Jury Instruction.

I believe that Notice was filed in May and I believe the Court may have had the opportunity to review it.

JA-10

It essentially states that it is a portion essentially of 8.84.2. The words of the motion are happily before the Court. I would advise the Court that it is my understanding that in the case of People versus Murtishaw which has been dealt with by us all on other issues, it is my understanding that the Supreme Court of this State appelled [sic] the rejection of such an Instruction but feel that for the record we must request it at this time as a modification of the CALJEC [sic] form as essentially extraneous materials have been removed by Mr. Spitzer.

THE COURT: Okay, the motion is duly noted and denied.

MR. MYERS: So far as 2.62 is concerned, Your Honor, we would ask that it not be given. It is much more tailored to the determination of guilt

and what I am concerned about is the second paragraph, which if you find that he failed to explain or deny any evidence against him introduced by the Prosecution we feel that that would not be appropriate to give in light of our motion and the Court's subsequent order on that motion.

We chose not to discuss the evidence in the guilt phase of this trial and I don't think it is appropriate to hold Mr. Brown or advise the jury that he might have been expected to explain or deny that rather large amount of evidence that had been introduced by the Prosecution in the case.

Under those circumstances we don't believe that anything need be said about the Defendant's testimony, either his refusal to testify as in the guilt phase or, in fact, that he testified in the proceedings simply as to his

background, aspirations and feelings about the one very serious offense that he had committed in 1977.

And I think it is extraneous and I'm sure that while Mr. Spitzer may not really be able to argue his not explaining really fully on the stand perhaps, but in any event I assume will argue to the jury that they did not hear anything from Mr. Brown indicating remorse or whatever; although we would object to that I suspect Mr. Spitzer will be permitted to make that argument, but so far as this formal Instruction we would feel it is not proper.

THE COURT: Anything you wish to state, Mr. Spitzer?

MR. SPITZER: No, other than with respect to the 2.62 1979 Revision. I agree with counsel that it is tailored in its present form to the guilt phase of

the trial. Nonetheless I think the proposition that it stands for, that is, the adverse inference which may be drawn from a failure of a Defendant who has essentially waived his Fifth Amendment privilege to explain those acts is one that is appropriate in the penalty phase.

The Defendant from his own testimony raised as far as the People are concerned the issue of his guilt by indicating in response to Mr. Myers' question, which I think was, "During the course of these proceedings have you maintained your innocence?"

Mr. Brown's response to that question was, "I do." Indicating certainly in leaving the inference that he was innocent of the charges and certainly raising the spector [sic] before the jury who have to consider obviously very grave

punishments, the idea of sending an innocent man to the gas chamber.

[No Omissions]

I made my objection at the time that the Court made its ruling and would only indicate that an examination of cases over the lunch hour, including the case of People vs. Goss, 105 Cal. App. 3d, 542, the case of People vs. Cartwright, 107 Cal. App. 3d, 402, and the case of, the Supreme Court case of People vs. Redmond, 29 Cal. 3d, 904. These are cases decided in 1980 and 1981 which are the most recent ones I was able to find relating to the right of a defendant to testify on his own behalf in a criminal case and deny culpability for the offense and then go on and proceed.

Those cases, the Goss case and the Cartwright case, stand for the proposition that even an implied denial of

the facts, as occurred here, opens up the door to cross-examination.

In the Goss case, quoting from the Supreme Court case of People vs. McClelland, at 71 Cal. 2d, 793, a 1969 case, the court held that implied denial of the guilt is considered as testimony denying the existence of any evidence relevant to the issue of guilt, which makes cross-examination about the subject of any such evidence properly within the scope of direct examination. It goes on to talk about the proper scope of cross-examination and argument.

The evidence in this particular case that the jury has been told that they can consider includes not simply the evidence that began on February 8, but includes all the evidence that was heard from January 4 in the guilt phase. And the defendant's desire not to comment on

that, I think the Court has heard about, yet I don't believe that the jury should be left asking themselves what they should do with the denial of guilt.

I believe an instruction is appropriate and that the People should be entitled to argue, as Mr. Myers indicated we would argue, about the lack of remorse and the lack of explanation.

I would submit it on those remarks.

Oh, one other thing, Your Honor, relating to Counsel's representation on the Murteshaw [sic] case, just so the Court is aware, we had cited the Murteshaw [sic] case to the Court last week and the Court, I know took care to read it. Murteshaw, [sic] to the best of my knowledge, did not make a specific holding on the requested instruction by the defense counsel, but rather held that

the burden of proof in the penalty phase was different than in the guilt phase, and there is a discussion about the relatively limited burden of proof and as a result of that limited burden of proof, the prejudicial nature of the testimony of the psychiatrist in that case was perhaps exaggerated and things of that sort.

So it was sort of a -- there was no holding, it was dicta in that case, although the Supreme Court made clear what its feelings were on the burden of proof. That's it, Your Honor.

THE COURT: I will sustain your objection to 2.62.

In my discussions with members of the Fourth District, 2.62 stands on shaky ground.

With regard to 8.84, we will give it as requested.

8.84.1 we will give it as presented.

And 8.84.2 we will give.

Was there some motion that I haven't ruled on?

MR. MYERS: Yes, Your Honor, it would be the modification 8.84.2 requested, and I believe the Court has that, and I would take it then that if they are given in the manner presented by the District Attorney, our motion is necessarily denied.

THE COURT: Yes.

Is there anything else?

MR. SPITZER: No, Your Honor.

MR. MYERS: No, Your Honor.

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[Reporter's Transcript pp. 6558, line
18-6564.]

Penalty Phase Jury Instructions

THE COURT: Thank you Mr.
Myers.

The defendant in this case has
been found guilty of murder of the first
degree. The charge that the murder was
committed under a special circumstance
has been specially found to be true.

It is the law of this State
that the penalty for a defendant found
guilty of murder of the first degree
shall be death or confinement in the
State Prison for life without possibility
of parole in any case in which the special
circumstance charged in this case has
been specially found true.

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Under the law of this State, you must now determine which of said penalties shall be imposed on the defendant.

You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case. You shall consider,

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take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's

homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, an [sic] after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

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If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

(NO OMISSIONS)

However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose the sentence of confinement in the State Prison for life without the possibility of parole.

You shall now retire and select one of your number to act as a foreperson who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree. Any verdicts that you reach must be dated and signed by the foreperson on a form that will be provided and then you shall return with it to this room.

Your verdict as to the Defendant will be one of the following forms. We, the jury in the above-entitled action fix the penalty under Count I of the Amended Information as death, or We, the jury in the above-entitled action fix the penalty under Count I of the Amended Information as life imprisonment without possibility of parole.

The clerk will be needed to swear the bailiff. In addition, I have asked the bailiff to take you to lunch over at the County Cafeteria, but as in the prior phase of this case you may make your determinations as to recesses and adjournments and again my admonition that you nto converse with anyone concerning the case, even with each other, will apply at any and all times that you are in recess or adjounment.

And that admonition will apply at all times that you are not all twelve together assembled deliberating, and as soon as you have all assembled and are together in the deliberation room, then the admonition no longer will apply as we did in the prior phase.

The clerk will please swear the bailiff.

(Whereupon the clerk swore the bailiff.)

THE COURT: And Miss Newman, Mrs. Tompkin, and Mrs. Thompson, if you would please remain.

(Whereupon the jury retired to deliberate at 11:35.)

THE COURT: And Miss Newman, Mrs. Tompkins, and Mrs. Thompson, if it is agreeable with counsel I would like to release you to go about your usual activities and with the understanding that

you are still on call here until this case is completely concluded.

And we would contact you as soon as it is. If we need to contact you and request you come in or if not, we'll call you to let you know that you have well and faithfully discharged your duties as jurors, and we would like to be sure we have the numbers that our clerk has, the latest numbers where you can be reached at work or at home or wherever you may be.

And if I don't see you again, I would like to thank you very much for your valuable and dutiful service that you have so faithfully attended. Thank you very much.

(Whereupon a recess was taken.)

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(The jury returned at 2:33 p.m. The following proceedings were held in the open court in the presence of the jury.)

THE COURT: It's noted that Mr. Brown is present with his counsel.

People's counsel is present.

All the members of the jury are present and in their places.

Has the jury reached a verdict?

MR. MANN: We have, Your Honor.

THE COURT: Is it unanimous?

MR. MANN: It is unanimous.

THE COURT: We will receive it through the Bailiff.

The defendant will please stand.

The Clerk will read the verdict.

THE CLERK: "The People of the State of California vs. Albert Greenwood Brown, Jr., Case Number CR-18104.

Verdict. We, the jury in the above-entitled action fix the penalty under Count I of the Amended Information as death. Dated February 19, 1982. Signed Roland O. Mann, Foreman."

Ladies and gentlemen, is this your verdict?

(All jurors answered affirmatively.)

THE COURT: You may be seated.

Does either party wish to have the jury polled?

MR. SPITZER: The People would ask that the jury be polled, Your Honor.

From Voir Dire

[Reporter's Transcript p. 420, lines 20-21]

MRS. CAROL HERSHEY

(By Mr. Spitzer)

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JA-30

[Reporter's Transcript p. 426,
lines 24-28]

Okay. And so what we ask you to do is to set aside personal feelings and apply the law just as if in the guilt phase we ask you to set aside bias and prejudice and apply the law.

A. I see.

[Reporter's Transcript p. 1964,
lines 9-10]

MARY ANN GRAY

(By Mr. Spitzer)

[Reporter's Transcript p. 1967,
lines 21-26]

At that stage, as in the first stage, the jurors would have to follow the law and put aside any of their own personal beliefs as to what should happen.

Is there any doubt in your mind right now as to your ability to do that? That is, following the law?

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A. No, that would be the way that I would do it.

[Reporter's Transcript p. 2046
lines 8-9]

DANIEL CALDON

(By Mr. Spitzer)

[Reporter's Transcript p. 2048,
lines 13-25]

Q. Has this crime been committed, are the charges true, things of that sort and to set aside in making that decision, items of personal prejudice and bias as Mr. Myers pointed out, sympathy for the parties, to act as judges unaffected by their own personal beliefs.

Do you think that in arriving at the decision this case, either the guilt phase or more particularly in the penalty phase, you will be tempted to be inclined to worry about what you feel should happen as a person, Daniel Caldon, as opposed to what the law requires?

Essentially I'm asking would you try to second guess the law?

A. No, Sir, I wouldn't.

[Reporter's Transcript p. 3157,
lines 11-12]

JOAN DAGGETT

(By Mr. Spitzer)

[Reporter's Transcript p. 3162,
lines 18-27]

Q. We ask jurors in both phases to put aside feelings of sympathy for the defendant or for the victim's family. Feelings of passion or prejudice. To be coolly analytical in their thinking. Critical of the evidence. Examining it to see if, in fact, the charges are true. Particularly in the penalty phase we ask the jurors to do the same thing and to make a decision based on law and not on their own personal philosophy or belief.

Do you think you would be able to do that?

A. Yes.

[Reporter's Transcript p. 3194,
lines 13-14]

ROLAND MANN

(By Mr. Spitzer)

[Reporter's Transcript p. 3203,
lines 6-19]

Q. Okay.

You understand that in that phase, just as in the first phase, we would ask jurors to put aside feelings of sympathy, passion and prejudice, motivations also putting aside any of their own personal convictions if they ran in conflict with the law.

You have told us you have no quarrel with the law that establishes the death penalty, but all those things would have to be put aside in determining how the law applies to the evidence in this case.

Do you think you would have any trouble doing that?

A. I really think I could handle the situation at the time it's presented under the instructions given me, you know, whatever the evidence is.

[Reporter's Transcript p. 3645,
lines 23-24]

CATHERINE MARTENS

(By Mr. Spitzer)

[Reporter's Transcript p. 3653,
lines 14-21]

Q. We ask jurors in addition to putting aside their own personal knowledge to put aside feelings of passion or prejudice, feelings of sympathy for the Defendant or for the victim's family, feelings of empathy for the Defendant's family and act as judges putting aside those emotional attachments that they may have or naturally want to develop when they sit as judges? Do you understand that?

A. Yes, I do.

From Penalty Phase Testimony

Donald Brown

[Reporter's Transcript pp. 6238,
line 15 - 6248, line 1]

Q. Mr. Brown, do you know the gentleman seated at the end of counsel table?

A. Yes, I do.

Q. Who is that?

A. It is my cousin Albert.

Q. How long have you known Albert Brown?

A. Well, I'm there too, and Albert is. I'm not sure how old he is. He's a few years younger than me. I have known him all his life.

Q. Where do you live at the present time?

A. I live in Tulare, California, which is down near Fresno in between Bakersfield, Fresno, Central Valley.

Q. What is your occupation?

A. At the present time I'm a law clerk with the Public Defender's office in Tulare County. I am a law school graduate.

Q. Are you preparing to take the Bar Examination?

A. I'll be taking the Bar, the part that I haven't passed, next Tuesday, next Wednesday.

Q. So this testimony occurs at a time when you are immersed in study, I would assume?

A. Right.

Q. Are you married?

A. Yes, I am.

Q. And do you have children?

A. No children.

Q. How long have you been working as a clerk with the Public Defender's office in Tulare?

A. I've been working ever since I graduated from law school. That's about approximately a year and a half.

Q. What is your father's name?

A. My father's name is Ernest Brown, Sr.

Q. When you were a child did you have the opportunity to play with and associate with Albert Brown, Jr.?

A. Yes, I did. As cousins we lived in the same town and his father and my father were close and so we saw each other on occasions just as children normally would, you know, throughout our childhood.

Q. As a young person, were there any particular pastimes that you engaged in with your cousin Albert?

A. Well, as I have two brothers and Albert was an only child so on a lot of occasions we would either be at Albert's home or Albert would be at our house or we would be at my grandmother's home, which is in Tulare, and we engaged in normal kids' play, stickball in the street, football, passing back and forth, or just being at each other's houses for family gatherings or being at my grandmother's and Albert and his parents would come by. So those types of occasions are when we would be together.

Q. When Albert was a young child was he an aggressive child?

A. Just the opposite. Albert was the type of person that I can remember as a young child myself at the time. He was very passive -- I think is probably the wrong word for a child in

that sense, but he was very quiet, very quiet type of person as a child.

You always knew when he was amused because he had a certain type of smile that he would give that you would know that he was involved in listening to what you were doing or involved in the play we may be involved in, but he was very mild mannered and even-tempered type of child.

Q. Were you?

A. I'd say I was probably a little bit more aggressive and active just because I had three brothers or two brothers and we were always into something together. So, I guess Albert stuck out in that sense where he was -- he was our cousin, but he wasn't involved in the situation where he had other

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brothers as playmates as I had as a person with two brothers.

Q. Do you have any particular recollections of times together with Albert as a young child that you can recall?

A. The times that I can recall that stick out in my mind would be circumstances usually on say maybe a Saturday where Albert would be brought to our house in Tulare by his mother usually to play with my younger brother Larry who was the same age as Albert, either to play or to go to the school ground together and Albert would spend the whole day with us.

He generally wouldn't stay overnight, but Albert always got along well with everyone that he was with. He

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wasn't the person that stood out for what he did or what he didn't do, but he always got along well.

I remember times when Albert, myself, and my two brothers would be taken care of by my aunt Ludie Brown at my grandmother's home where she would take care of us in the evening, then we would be together. We always got along well.

I can never remember a time where we had a problem as a group of kids which may have been started by Albert. That's just the type of person that he was as a child.

Q. Albert, were there occasions when you or your brothers would go to Albert's house to play?

A. There were occasions, but they were very few and it sticks out in my mind because there were not that many.

Albert and his father and mother lived in a neighborhood which was right next to my mother's sister. You have to understand Tulare is kind of a small town. A lot of people, families, still stay there so it is a very family oriented type of town and we're a very close family. And we just never went to Albert's home that much. We may have been at aunt's home and we would see Albert. That would be more the occasion than actually going to his house in that sense.

[No omissions]

Q. So I take it, from what you said, you don't recall Albert as being an angry or an aggressive or a fighting kind of child?

A. No, not at all. I, myself, could never -- I couldn't think of a situation or I cannot think of a

situation right now where, as a child, I saw him fight with another person, say, another relative, and I never saw him fight with my younger brother, as an example, or me or my older brother.

Q. What is your younger brother's name?

A. His name is Larry Brown.

Q. Where does he live?

A. He lives in Walla Walla, Washington.

Q. What does he do up there?

A. He works for the State Prison there. He is a cook at the Walla Walla State Prison.

Q. Did he take some college to prepare himself for that?

A. Yes, he went to Spokane Community College, that's in Spokane, for a two-year cook program and he got on there as an institutional cook. Albert

hasn't seen him for quite a while and that's probably news for him, too.

Q. And as far as you know, he lives up in Walla Walla at the present time?

A. Yes.

Q. Did you have occasions to see Albert in his adolescent or high school years?

A. Yes, I did. As I say, Albert is the same age as my younger brother, so I was a few years ahead of him in school. But being through Larry and growing up there and being the type of family that we were, we kept in contact with him. I'd see him every now and then and again he was in school and in terms of academics, I can't think of anything that distinguished him in my own mind in terms of what he did or did not do. He did, you know, fairly well in

school. I know when he got into high school he started to grow and fill out and I personally, I always felt that he would be a good athlete and it turned out that in his junior year, I believe he played football, I think he played football in his sophomore and junior years in high school and Albert did very well. He did very well. He was a good team player, again, didn't distinguish himself in terms of a person who caused any problems on the team, but he was a very good player and I saw him play on a number of occasions and was kind of surprised to see he did as well as ~~he~~ did with the temperament that he had to play in a football situation. There is a premium on certain type of contact and controlled violence and he was a very good player.

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Q. And that surprised you,
given his --

A. Temperament as a younger
child and then I could see nothing to
change that as he went into his ado-
lescent years.

Q. Did he still seem to be a
quiet sort of nonassertive individual in
those years off the playing field?

A. Very much so from my con-
tact with him. He seemed to be basically
the same type of person. He developed
into a character that was very -- he was
very quiet. Albert was the type that you
had to speak to instead of necessarily a
conversation starting. He is just that
type of a person. That's, I don't think
that's unusual, but I think that he was
that type of person where you would have

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to start a conversation with him. He wasn't that up front in terms of conversation.

Q. Was Albert known as Albert to you, is that when you talked to him?

A. No, Albert was known as "Tweedle."

And that was his nickname, but I am not sure where the nickname came from, either his mother or father, but we always called him Tweedle. Sometimes, you know, Junior, but I very seldom now even call him that, I mean I guess I do call him that now because he is, you know, he is a grown man, but that was his nickname for as long as he was at home.

Q. So on occasions when I have had an opportunity to talk to the family and to Larry, everyone says Tweedle?

A. That's why, that's right.

It's always from Albert Jr. to Tweedle.

Q. You played football also, did you not?

A. U-huh, played in high school and college.

Q. And baseball as well?

A. Uh-huh, basketball.

Q. And to your knowledge did Albert participate in any other sports formally with teams, baseball or basketball?

A. I believe Albert may have played some Little League, maybe a good year or two, I am not certain, but I don't believe he played any basketball, if I remember right.

Q. You also were in the military service, were you not?

A. I was in the Marine Corps for two years.

Q. Did you have an opportunity to meet your cousin Albert when he was in the Marine Corps or shortly thereafter?

A. No, I didn't have a chance to meet him because I was in the service in '68 through '70 and I was discharged and he went in the service, I think '70 or '71, '72, somewhere in there. He was in for four years and I didn't get a chance to see him while he was in the service. I saw him once while he was on leave and then I saw him when he just got out of the Marine Corps and as being someone who, as an ex-Marine, there is certain types of experiences that are common to people who are in the Marine Corps and that you can look back on with some enjoyment and kind of laugh once you are out. Boot camp being one of those things. I remember talking with Albert

about that, about how he enjoyed boot camp or didn't enjoy it. How it went and this was when he just had gotten out of boot camp and was home on leave. And I just remember seeing the change in him. I thought that he matured kind of in a silent manner, I guess that's the best way of seeing it, because he was still that type of person. He was still that type of quiet, he was a young man then, but he was a quiet type of person. He felt he had done okay in the boot camp. I believe his specialty was wiring telephone communications, something to do with that, I believe, and from all the indications he did very well in that, in his specialty while he was in the service.

Q. You were aware that Albert had, before this case arose, had been convicted of a rape previously?

A. Yes, I was.

Q. Were you surprised at that or the development of this case?

A. Very honestly, I was. It was a situation where Albert was close to me and our family in the sense that we grew up together, had relationships for a number of years and to hear that these things had occurred, it did surprise me. Prior to being separated from him in the sense that these things occurred up in this area and we, not knowing what the basis for them were and putting that together with Albert's personality as I knew him and as people in our family knew him, the fit didn't seem to be correct.

Q. That kind of violent thing seemed out of character, I take it?

A. Yes, the violent nature of the first offense that he was convicted of, and then this offense didn't seem to be consistent with the type of person

that he had been in terms of how I had known him throughout my life.

Q. You are his cousin, you are not an unbiased witness in these proceedings?

A. No, it's clear.

I mean, I understand, I feel very much for him and it's not a sense of help in the sense of telling anything that is false, to help in a way that testimony can allow people on the jury to get to know Albert as a person. I think it's important.

(NO OMISSIONS)

MR. MYERS: I have no further questions.

Albert Brown Sr.

[Reporter's Transcript p. 6299,
lines 20-23]

Q. Mr. Brown, how old are you?

A. Fifty-four.

Q. What is your present occupation?

A. Psychiatric technician.

[Reporter's Transcript p. 6300,
lines 16-20]

Q. You know who is sitting at the end of counsel table?

A. Yes.

Q. Your son Albert and named after you?

[Reporter's Transcript pp. 6301,
line 23 - 6309, line 16]

Q. Your first wife, Dorothy and you were divorced some time ago. When was that?

A. '64.

Q. How old was Albert when you were divorced from your wife, first wife?

A. He was just getting ready to go to school. That would make him about six years old.

Q. Before that time what kind of a child was he as you had the chance to observe him at home?

A. Well, personally I thought he was very -- what can a father say? A very loving child. He was no real problem, just like little kids are, but he was very attentive, polite.

He was just what I consider just a typical, normal young man, normal young child.

Q. Your brothers came down today and all from Tulare and Porterville.

Do you recall observing him playing with his cousins, your brother's children?

A. Yes, him and Donald, the fellow that testified earlier, his cousin, they used to spend not a lot of time together but they would -- my little

sister Ludie, she would baby-sit with the group of them mostly.

And so basically they got along real good. They never had no real problems.

Q. At the time Albert started into public school is about when the divorce and break-up of your first marriage occurred, is that right?

A. Right. When we were separated he hadn't started to school yet. He started to pre-school like I say, he must have been about pre-school, probably about five, I guess, five or six.

Q. Did you have a chance to see him on a regular basis after your separation from your first wife?

A. No, not really.

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Well, when me and my first wife was divorced, it was kind of stormy. I'll put it that way.

So, I didn't get to see him as much as I would have liked to and rather than really -- in other words, I just figured it was best not to push it for his sake and I was just sort of just -- I would say I would see him more or less when Dorothy said it was all right.

Sometimes she would say it was okay and then at the last minute she would change her mind, stuff like that.

I didn't really push it because I thought it was better for the child not to see a rivalry between the parents, conflicts. It was enough, the fact that we were separated, you know, so I didn't want him to see any hostility between the two of us.

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I don't think he really did at that stage.

Q. You had the opportunity to see him at least some of the time, though, I take it?

A. Right, mm-hmm.

Q. As he got older, did you have a chance to see him more often than the first part of the separation or divorce?

A. Yes, because as he got older like I used to tell Dorothy, I says, "When he gets a little older he will seek me out," which he did.

So, he would come to see me at times and she knew it all the time but we always have been able to -- well, I have a good relationship with him and he'd more or less -- he'd believe what I would tell him and I wouldn't tell him anything wrong.

To me he was a very obedient son.

Q. Do you know whether he had any serious problems getting along with other kids in school?

A. Well, I wouldn't say serious.

Q. Back in junior high?

A. Not really serious problems, not to my knowledge, a loner, really. He stays to himself most of the time and I don't think I could say he had any problems in his relationship with his peers or anything like that.

He would go overboard as far as trying to please someone else in order to be accepted in a group, for example. That's he would go overboard as to doing favors or stuff like that to enhance

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chances of being accepted by his peers, whether he had to or not. He just did that.

[No Omissions.]

Q. Take the other kids for rides, that sort of thing?

A. Yes. And, oh, and then, too, if he had something that he really valued, a toy or even so much as to say a BB gun or something like that and some other kid wanted it, he would probably just give it to them. I don't know whether that's good or bad, but I can recall one incident where Dorothy just bought him a new bicycle and, you know what a bicycle costs, and the little kid across the street had a BB gun and they just decided that they would trade, the two of them, a BB gun for a bicycle. Needless to say, we couldn't let that

stand. But it was just the fact that he said he wanted it and that was that.

Q. Throughout Albert's adolescent years and into the high school years, I take it your former wife still had custody of him?

A. She had custody all up until he went into the service. Out of high school, he went into the service.

Q. About how old was he when he went into the Marine Corps?

A. Let's see, a senior in high school, probably about eighteen, somewhere along in there. Horrible age.

Q. This was a senior in high school?

A. Yes, right after he got out of high school.

Q. Do you know whether there had been any particular event that precipitated his leaving high school?

A. I don't know whether the events actually caused him to leave high school, but it was a incident there involving, they say he had a weapon at school that was discharged in the schoolroom. I never saw the weapon. I really -- I don't really have any real details on it, but I don't think that was the reason for him leaving school, though, or going into the Marines.

Q. You don't know what action the school took?

A. I really don't know what action the school took on that, I really don't.

Q. When he went into the Marines, did you get the chance to see him at times on leaves?

A. When he would come home on leave, yes.

Q. How did he seem to be reacting to the Marine Corps?

A. Well, when he first came back from the Marines I looked at him, I said it wasn't him, you know, because of course when he went in he was not fat, but he had a little weight on him and when he got through boot training in the Marines, when he came home, he looked like a racehorse. Skinny, but, well, all muscle, that's what he was like and he had that Marine attitude that they were the greatest, you know, proud, stuff like that.

Q. Did he talk to you much about his later experiences in the Marine Corps after boot camp or after his overseas time, that sort of thing?

A. Well, not extensively, but just before he got out of the service he said he had a problem in the service with

the non-coms or something like that and it had something to do with the Klan organization there in the service. They got all fouled up in that and just what the real outcome is as to what really happened, I don't really know.

Q. When he got out of the service your wife indicated that he stayed with you for some time?

A. Right.

Q. During that time, how was he adjusting to civilian life again?

A. Well, I think he was adjusting real well because he came up with talent that I didn't realize he had. Different type jobs he had.

For example, he had, he applied for a cook's job at a place called Perko's, it's a chain of restaurants we got in the Valley, and Smith Markets, and I went down there one day to order some

food and I looked behind the kitchen and he is back there cooking. I didn't even know he could cook. And he left that job and he got a job as a night watchman and, you see, when he was in the service, actually he was in the communications but when he came out he applied to work for the telephone company and he never could get in there.

Then he'd apply at other places where he could use his training as communications and he was either overqualified or something like that, usually. So he never did really get a chance to work in the line of work that he did when he was in the service.

So, then, he took odd jobs, started working at K-Mart as a stereo installer in cars or something like that, he has always been interested in electrical or electronics, like that.

Q. You have continued to live in the Tulare area all this time, I take it?

A. Except when I was in the service, yes.

Q. What branch were you in?

A. Army, drafted.

Q. Your wife, Martha, has indicated that many times you and the two younger children and she would visit Albert after he was in the prison?

A. Oh, at San Luis Obispo.

Q. The last few years?

A. Uh-huh.

Q. About how often do you recall being able to go?

A. Oh, while he was there, I would go at least once a month I would be down there, sometimes twice a month. And the kids, when they would go with me, they would like to go because it's so

close to the beach, Morro Bay, it's only 10 miles from the beach. So we would go by and spend the afternoon with him and then we'd leave there and go up to Morro Bay to the Beach. In other words, made sort of an outing for the kids. And they looked forward to seeing him, you know, they hadn't been around him that much, but that was their big brother and he always did take up a lot of time with them, he would play with them.

Q. The case that caused him to be sent to San Luis Obispo and the circumstances of this case, did they surprise you?

A. Definitely. The reason it surprised me was he had never had any trouble like that before and he had never had any -- he always had, I'd say, a good rapport where he could meet friends,

males and females, so he never had any trouble going out with girls. In fact, girls chased him, and then when I found out what he was accused of, to me it just didn't make sense, and that's the way it was.

Q. The violent side appeared to be out of character for Albert?

A. Well, I have never seen him violent. Just actually just the opposite. He would walk away from something rather than really get into a confrontation if possible. But basically I do the same thing, if I can walk away from a situation, I would do that, so if you can't walk away where you got to defend yourself, that's about the size of it.

Q. You are not an unbiased witness, I would think?

A. Unbiased, probably not.

Q. You want the jury to show mercy to your son?

A. Definitely.

MR. MYERS: I have no further questions.

Dr. Robert Summerour

[Reporter's Transcript p. 6384,
lines 25-26]

Q. Dr. Summerour, what is your occupation?

A. I'm a physician specializing in psychiatry.

[Reporter's Transcript p. 6387,
lines 6-8]

Q. You have had occasion in the past months, have you not, to talk to, to examine and interview Albert Brown?

A. Yes.

[Reporter's Transcript p. 6402
lines 2-18]

In that interview, I have an impression, from what he tells me of a

young boy who has been separated from his father who he idealizes, wishes to be closer to him, but is primarily with his mother. Sees his mother as treating him unfairly and harshly and being a rather shy, passive child until high school, when he begins to become more aggressive. He gives the impression of no difficulty in the sexual area. He is sexually active as an adolescent, really denies any sexual problems. Difficulty adjusting to the Marines with probably first real contact with serious racial differences between people, something that had not been much of a problem for him in his life in Tulare where he had grown up.

He had gone during that time, then, with kind of a resistance, you might say, to what he felt was unfair treatment. In fact, he told me in

another interview that he and another group of black men would take pride in how they would outsmart the ranking officers. This, I think, was a way of coping with what he was experiencing in the military.

[Reporter's Transcript pp. 6403,
line 1 - 6407, line 4]

A. Well, I think the most important interview that we had occurred on the 10th of February. And it's in that interview that Albert states that he had had problems with women. Before that time, he is basically telling me that he has not done too badly with them. He has not had much difficulty, but in that interview he tells me that as an adolescent he never had a sexual encounter. In fact, he never had a sexual encounter at all until he was in the Marines when his buddies bought a prostitute for him,

and that in the Marines he had had a total of three contacts with prostitutes during which he had actually accomplished intercourse. But many other contacts when he could not perform. And, in fact, even with the prostitutes he had not readily achieved erection and in fact has had problems with impotence intermittently throughout his life.

He told me then that he was even afraid to kiss girls, that he was embarrassed to approach them if he had a romantic interest in them. Told me of his friendships with girls during high school, that he would really relate to mainly his sisters. He would protect them at school, he could watch out for them, he would walk them home because of these relationships would therefore develop into romantic relationships.

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He denied that he had experienced an orgasm in any way until his first experience in the military when he was about eighteen. Denied masturbation.

Now, normally an individual, as they develop sexually, will during pre-adolescent age, through the pubital changes, will begin to have sexual changes and will experience those feelings as frightening, but generally there is a certain degree of exploratory masturbatory behavior and that is normal as long as it is not to excess. There is comfort then in time with developing girlfriend attachments and petting.

According to the moral values, many adolescents will not engage in intercourse but they can engage in petting behavior without being frightened. And in Albert's case, it

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appears that he could never comfortably approach girls that he had a romantic interest in and, in fact, even privately was uncomfortable with his sexual feelings.

Now, why this was true, we talked about this a little bit, and I think it may relate to what he felt was his mother's attitude about his sexual feelings and sexuality. He said that he remembered his mother telling him that if he did "dirty things" with girls that his fingers would fall off and that one of his legs would get shorter. And he said he had an uncle who missing some fingers and he thought in his way of understanding was that he must have done something dirty with girls when he was a little boy.

In spite of being shy with girls and not confident of his own

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sexuality, and I think probably his own sense of masculinity that was emerging at that time, he was acting in a kind of macho bravado way so that people saw him as being sexually active, as being fine in that area and he enjoyed that people thought that about him because it helped him feel better about himself.

So his first sexual experiences were in the military with prostitutes and in that setting he claims that he was impotent and that it was very difficult for him to get or maintain an erection. He would set about to try to be sexual with prostitutes and then not follow through because he would become shy and uncomfortable. Said it would embarrass him. Claimed that he never talked to his father about sexuality, didn't have talks about this and he never told anyone that he was unsure of himself in this area.

(NO OMISSIONS)

The next sexual experience was after he got out of the Marines and he met a woman who was a distant -- not a blood relative -- but a relative of his father's second wife named Betty Jane who was in his words a nymphomaniac, real aggressive who approached him.

He claims that this woman talked to his father about whether or not it would be okay if they became involved sexually. She really took all the initiative. He claims the first time that they were in bed together they had foreplay for about eight hours and he was unable to get an erection for those eight hours, and then he says finally he got an erection and had intercourse and then they had a sexual relationship only that lasted for a brief time where she would always be the aggressor.

He would basically be passive and she would take all the initiation, and with her stimulation, her aggressive stimulation with him, he could obtain an erection but otherwise could not on his own.

During the same time he claims that he attempted to have intercourse with a girl named Chris who was a sister of Terry and Terry was the girl he was really interested in. He liked Terry who was about seventeen or so.

He wanted to date her, wanted to get romantically involved with her, but her father -- Terry was not black. I think she was Spanish and her father did not approve and would not allow him to date this girl and he felt that they were pushing Chris off on him.

He claims that Chris wanted to have intercourse but she was not a

virgin, she was younger, and that one evening they attempted in the backyard of her house but he was unable to get an erection.

He claims that after his sexual encounter with Betty Jane that he had no sexual contact until the rape of Kelly.

[Reporter's Transcript pp. 6408
line 7 - 6409 line 13]

Now, from this interview I'm impressed that Mr. Brown has a greater degree of sexual disfunctioning than he has admitted to before, and basically he has covered this up both to his parents and his peer group that basically he is a shy man and that he has some problems in this area about feeling confident about himself as a man and relating to women in a romantic way.

And while I cannot draw any definite conclusions about the psycho-

pathology here, I think if one ties together his relationship with his mother, separation from his father, and at least up through the range of Kelly, his behavior with girls, you see that his relationships with girls are very important to him.

He likes to be admired by them. He liked to be appreciated. He's kind of like a big brother. He likes for others to think of him as being competent with girls and sure of himself but, in fact, he is basically afraid of sexual contact. He's afraid he will fail.

In fact, I think he has had experiences where he had performance anxiety and as a consequence was impotent and may on a deeper psychological level feel that his sexual wishes or desires are, in fact, bad and dirty and that he should not - does not have a sense of

what is normal in the way of sexual
attraction and behavior.

In the behavior with the youths
they are able to act out in a way that he
cannot and I think he identifies to some
degree with their level of sexual deve-
lopment because he himself is not
sexually developed beyond a pre-
adolescent kind of stage.

The only sexual experiences he
had had were with situations where he did
not have to be assertive, where either
the sexual partner was aggressive and
took charge and he was passive or else
under the conditions of prostitution
where sex is paid for.

Even in this case on the ini-
tiation of someone else.

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[Reporter's Transcript pp. 6412,
line 19 - 6414, line 16]

A. Well, the thing that I think, I believe that what motivates Albert Brown is primarily in terms of rape behavior, I think, is primarily sexual desire or sexual wishes which are impaired by his fair of sexual contact with women. And I think that if we look at the encounter that he had with Kelly and the way he dealt with it afterwards, that while he uses aggression to control her and to, in a sense, have his way with her, he does not mutilate her, he does not harm her physically beyond the degree to cause her to cooperate with him. Then his response after this rape is to develop a romantic idea about their relationship.

What he thinks of as a relationship, even telling himself that she liked him, that he was pleasing to her,

that he had shamed her and that he had done a terrible thing to her which he should try to make up for. But somehow he was going to become special to her and her family.

Now, to me, that fits the history suggesting that this man, in real life, is unable to have a normal relationship, romantic relationship, with a woman. He can only have a sexual relationship if there is some lack of responsibility on his part. He is unable to integrate tenderness and warmth and love which is something that he longs for with a woman as sex, but he sees sex as bad and dirty and with Kelly, I think that he in time takes out the sexual part and begins to think of them, really, more in an ideal way. This is, of course, unrealistic. I think that supports the theory that he is primarily motivated by

sexual drive. And also we don't see that this man, in my view, is an impulsive individual. He is impulsive, but not impulsive to the degree that one would say he is a sociopath. He is able to work, he has worked regularly at jobs, he values education and has made efforts to develop in that division. He has maintained relationships with his family. His parents say that he was always generous with family members and was able to care about people. But never got really close to anyone. So I don't see him as an impulsive-ridden, sociopathic individual.

Looking at the aggressive side, there is a history of fighting in school. Primarily over girls. Primarily over whether or not he should, early on, be interested in a black girl that he wasn't interested in, the girl he was interested

in, the girl he was interested in wasn't black. There is fighting later, I think, in high school, as a part of his overcompensating for his feelings of weakness. I think that the gun incident which was very serious, was really an accident, but he was careless in taking the gun to school and he took the gun to school because it was part of his image. Beyond that, I don't understand why he took it.

But we don't see him committing violent crimes throughout his history except for associated with rape. We don't see, really, a violent aggressive man that people are afraid of. People didn't feel uncomfortable around him. People weren't afraid of Albert. So I don't think aggression is the primary problem. The primary problem has to do with sexual drive and difficulty in that area and shame.

[Reporter's Transcript p. 6415,
lines 7-23]

A. Well, I can suggest a possible understanding of that.

I think that Mr. Brown is ashamed and really afraid to face this problem. And I think facing it, the way he put it was he didn't want to make Kelly any more uncomfortable than she had to be because it was so hard for her to go through it, and I think perhaps that's what he consciously think - [sic] is his motivation for avoiding her. But I think it's more likely that he cannot face her without feeling uncomfortable and he will avoid that. He will avoid facing anything, if he can, that suggests that he has a sexual problem or that he is inadequate in any way as a man.

And when you rape a woman in this society, you are not thought of as being very adequate as a man. I don't

think he thinks of himself as adequate as a man, even though he, at times has tried to act that way. So he can't face her in real life because that's too painful. He can only face her in his fantasies.

From Prosecutor's Closing Argument

[Reporter's Transcript p. 6522,
lines 11-13]

The People may proceed with argument, Mr. Spitzer.

MR. SPITZER: Thank you, Your Honor.

Good day, ladies and gentlemen.

[Reporter's Transcript pp. 6522,
line 28 - 6524, line 27]

On January 4 of this year, a little over a month and a half ago, you all sat down for the first time as a group. You took an oath before God and began to listen to testimony.

"Each of you do solemnly swear that you will well and truly try the matter now pending

before this Court and a true verdict render therein according to the evidence and the instructions of the Court, so help you God."

During the voir dire examination, that interview process that occurred from the middle of October to the middle of December, we asked each of you whether or not you would be able to follow the law, to put aside your own personal beliefs and feelings about things such as the death penalty or crime and decide this case on the law. To determine which of two alternative penalties, both of them serious, should be imposed in this case.

Each of you indicated that you could do that. That you could follow the law. Doing that, ladies and gentlemen, following the law, makes you judges. It is your duty as judges in this case to direct your attention and focus on the

law and the evidence. That is exactly what you did in the first phase of the case when we asked you to decide the guilt of the defendant based on the law and the evidence.

Putting aside personal feelings of passions, prejudice, sympathy. Your verdict in this case, ladies and gentlemen, has to be one based on the law. It is not a vote from the heart and cannot be one. The judge will instruct you that you must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case and that you reach a just verdict regardless of what the consequences of that verdict may be.

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None of you, as I pointed out during your interviews, volunteered for this job. None of you went to law school, studied law, became proficient, ran for public office, accepted black robes to judge people. But you are judges. In this society, we ask that the community, individuals without legal training who have a stake in the community, judge serious cases as you are confronted with here. And as such, you are representatives of that community, individuals who promised that you could put your feelings aside and apply the law of this community.

You knew when you started out what the possible consequences of your decisions might be. But you are going to be asked to apply the law without regard to those consequences.

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What is the law, ladies and gentlemen? How can human beings, how can Judges make a decision between those two alternative punishments without regard to personal feelings? Where is your focus to be?

Remember, during the voir dire examination, I told you that the Court would not leave you adrift to your own feelings to decide which of the two punishments should be imposed. That the Court would provide you with guidelines, instructions, a way to make these decisions and, indeed, that will happen.

[Reporter's Transcript pp. 6540,
line 12 - 6542, line 8]

Finally, ladies and gentlemen, there is the factor of other circumstances which extenuate the gravity of the crime, even though not a legal excuse, if present, it might mitigate, if absent there is no mitigation.

There is no evidence, ladies and gentlemen, I would suggest to you, which extenuates the gravity of this crime, the killing of Susan Jordan that has been presented. No explanation, no remorse and I might comment at this time regarding the other witnesses outside of Dr. Summerour called by the defense.

Mr. Myers brought to you in two days a parade of relatives who admitted that they were biased witnesses in the case, who told us a lot about the defendant from their point of view, They told us what a good boy he was at the time in his youth when they knew him. And he brought them gifts and that he cared after his siblings. They did not testify, ladies and gentlemen, regarding any of the factors which relate to your decision in this case. Their testimony here, ladies and gentlemen, I would

suggest was a blatant attempt by the defense to inject personal feelings in the case, to make the defendant appear human, to make you feel for the defendant, and although that is admirable in the context of an advocate trying to do his job, you ladies and gentlemen must steel yourselves against those kinds of feelings in reaching a decision in this case.

As the Judge will instruct you, you must not be swayed by sympathy. One thing I think we learn from some of those defense witnesses is that in some sense to them the defendant was as much a stranger to them as he was to Kelly Porterfield or to Susan Jordan. Many of them apparently had turned a blind eye towards the defendant's problems when he was growing up, many of them were deceived by his actions. Some didn't

or still don't know the true extent of the defendant's criminality. It's hard to believe that young Troy or Larry Jackson are really aware of the seriousness of the crimes here. You should not be surprised at that.

Rapists and killers are, unfortunately, among us and it's always a surprise that someone you know gets charged with a crime this serious, this horrible.

As I indicated in my closing remarks during the guilt phase, one of the tragedies of this case is the effect of the case on the defendant's family or the defendant's mother, Mrs. Jackson. But, as judges, ladies and gentlemen, you have to steel yourself against those emotions and in order to do that, you have to focus on the law, the requirements of the law. Hard as it is to say, ladies

and gentlemen, the request that you heard to show mercy staged by Mr. Myers in this case have to be ignored and set aside. You have a duty beyond that and those appeals, ladies and gentlemen, would be as inappropriate and improper for you to consider as would be the appeals from Susan Jordan's family to show vengeance or retribution on the defendant, or Kelly Porterfield's parents coming in angry.

[Reporter's Transcript pp. 6543, line 7 - 6543, line 20]

You are judges and it is your duty to apply the law, to follow the instructions which the judge will give you and listen and pay attention to the evidence which you have already done. And when you go through the factors, you will see with each factor there is no mitigation, circumstances of the crime, no mitigation. Absence of criminal activity, no mitigation; absence of prior

felony conviction, no mitigation.

Whether or not the victim was a participant, no mitigation. No mitigation, no mitigation, no mitigation, no mitigation. Age of the defendant, no mitigation. Whether or not the defendant was an accomplice, no mitigation. Other circumstances, no mitigation, ladies and gentlemen, but there are factors in aggravation.

And in the weighing process, they outweigh the absence of nothing.

[Reporter's Transcript pp. 6544, line 3 - 6545, line 18]

This is not going to be a pleasant decision to render. All 12 of you have to decide the case and be unanimous. You have to be able to put aside these personal feelings and emotions in deciding the case.

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JA-95

How do you do that? You do that by focusing on the law. Doing what you swore an oath to do. Doing what you told us at the beginning of the trial you were capable of doing.

Judges who sit up on benches and wear black robes often get very bad raps, they have a very difficult job to do and they receive little comfort in making these hard decisions.

(NO OMISSIONS)

Any comfort they receive is in knowing that they did their duty. They followed their oath. They applied the law. They acted fairly under the law.

You, ladies and gentlemen, in working together have to focus on that law. If the motion and other sentiments begin to creep in, ask yourselves what is

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JA-96

my duty under the law? Am I looking at the legal requirements, am I following my oath?

You are a community of minds, ladies and gentlemen, and represent that greater community. It is your duty to work together and collectively you have the strength and wisdom to make the decision. It is very hard and unpleasant to make.

You have that duty to render a true verdict according to the evidence on the Instructions of the Court focusing on the law, listening to the evidence. Being judges in this case, you make the decision and make it unanimously and the People of the State of California, ladies and gentlemen, can't ask anymore.

Thank you.

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JA-97

[Clerk's Transcript, page 166]

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF RIVERSIDE

Page #1 of 2 Pages

PEOPLE VS ALBERT GREENWOOD BROWN, JR.,

Date & Dept: 1-4-82 5

Number: CR 18104

Counsel: District Attorney by Joseph
Peter Myers

Robert Spitzer, Deputy

Reporter: William Beam and Dorothy
Dawson

Proceeding: 33rd DAY JURY TRIAL -

VIOLATION OF SECTIONS & CHARGES:

187PC(190.2(a)(17)Sub(iii)P.C.(Count I)

261 Sub 2 & 3 P.C. (12022.8PC)(Count II)

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C.

(Defendant Status: CUSTODY)

(NOTED: Using two Court
Reporters - running a daily transcript)

People represented as indicated
and defendant present with counsel.

JA-98

Alternate Juror - Brian Reiss
is present and seated in the courtroom

Court and counsel take up the
matter of his new employment, subse-
quently he is excused by stipulation.

Officer Michael Whedon is
designated as the Peoples' investigating
officer - so ordered.

Defense counsel moves to allow
defendant's mother to remain in the court
room during the entre (sic) trial -
GRANTED.

All members of the jury and the
alternate jurors are present and seated
in the court room.

Jury and alternate jurors are
sworn as trial jurors, VIZ:

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JA-99

- | | |
|----------------|----------------|
| 1. C. Hershey | 7. H. De Mers |
| 2. D. Hayek | 8. D. Caldon |
| 3. M. Gray | 9. C. Martens |
| 4. J. Lovelace | 10. R. Mann |
| 5. J. Daggett | 11. I. Hamblen |
| 6. T. Hunter | 12. C. Brown |

Alternates Sworn:

1. D. Newman
2. J. Tomkins
3. J. Thompson

Counsel make opening statements.

Karen Jane Jordan, sworn and examined

Photo of the victim marked
Peoles' (sic) Identification #4

Vans' Tennis shoe marked
People's Identification #7-f;

Susans' clothing marked
Peoples' Identification as follows:

_____, Judge _____, Clerk

JA-100

**NOTE REGARDING THE JUDGMENT OF
THE CALIFORNIA SUPREME COURT**

The opinion and judgment of the
California Supreme Court in People v.
Albert G. Brown, Jr., Crim. 85-1563
(Superior Ct. No. CR 18104) is contained
in the Appendix to the Petition for Writ
of Certiorari at pages A-1 through A-104.

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 85-1563
October Term, 1985

JOHN K. VAN DE KAMP
Attorney General of
the State of California
JAY M. BLOOM
Deputy Attorney General

PEOPLE OF THE STATE OF
CALIFORNIA,

Petitioner,

v.

110 West A Street, Suite 700
San Diego, California 92101

ALBERT GREENWOOD BROWN, JR.,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within JOINT APPENDIX as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Robert Scarlett
Monica Knox
Deputy State Public Defenders
107 South Broadway, Suite 9111
Los Angeles, CA 90012

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 14 day of July 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 14, 1986.

Subscribed and sworn to before me
this 14th day of July 1986.

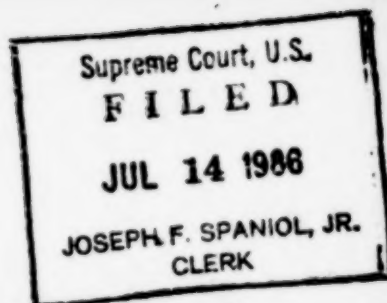
Brenda J. Locke

Notary Public in and for said County and State

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.



(4)
No. 85-1563



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

BRIEF ON THE MERITS

JOHN K. VAN DE KAMP, Attorney General
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Attorneys for Petitioner

PETITION FOR CERTIORARI FILED MARCH 22, 1986

CERTIORARI GRANTED JUNE 2, 1986

9874

i.

QUESTION PRESENTED

1. Whether an instruction at the penalty phase of a death penalty trial not to be swayed by mere sympathy, passion, prejudice, public opinion, or public feeling violates the Eighth Amendment where the defendant has been permitted an unlimited opportunity to present mitigating evidence and the instruction merely advised the trier of fact not to consider matters not relevant to the offense or the offender.

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I	<p>IT DOES NOT VIOLATE THE FEDERAL CONSTITUTION FOR THE TRIAL COURT TO INSTRUCT THE JURY AT THE PENALTY PHASE OF A CAPITAL CASE THAT THE JURY IS NOT TO BE SWAYED BY MERE SENTIMENT, CONJECTURE, SYMPATHY, PASSION, PREJUDICE, PUBLIC OPINION OR PUBLIC FEELING</p>	29 - 63
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No. 85-1563

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the penalty of death is reported in People v. Brown (1985) 40 Cal.3d 488. The opinion is included as Appendix A to the petition for writ of certiorari.

JURISDICTION

The judgment of the California Supreme Court was filed on December 5,

1985. (Appen. A to Petn. for Cert.) A timely petition for rehearing was denied on January 30, 1986. (Appen. B to Petn. for Cert.) The petition for writ of certiorari was docketed on March 22, 1986, within 60 days after the petition for rehearing was denied. The petition for writ of certiorari was granted on June 2, 1986. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED

1. United States Constitution, Amendments Eight and Fourteen.

2. California Penal Code sections 190.2, 190.3. The text of California Penal Code sections 190.2 and 190.3 are set forth in the Appendix to this brief.

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STATEMENT OF THE CASE

By an amended information filed on October 15, 1981, the District Attorney of Riverside County charged respondent in count I with murder, in violation of California Penal Code section 187.¹/₁

It was further alleged the murder was committed while respondent was engaged in the commission of the crime of rape within the meaning of Penal Code section 190.2, subdivision (a)(17)(iii).

Respondent was also charged in count II with rape, in violation of Penal Code section 261, subdivisions 2 and 3. It was further alleged he inflicted great bodily injury within the meaning of Penal Code section 12022.8. Additionally,

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1. All statutory references are to the California Penal Code unless otherwise designated.

it was alleged he suffered two prior felony convictions. (CT 1-3.)^{2/} Respondent pled not guilty and denied the special allegations. (CT 25, 82.)

On February 4, 1982, the jury found respondent guilty of first-degree murder and forcible rape as charged in the information. (CT 194-195.) The jury specifically found the murder was committed with express malice aforethought, premeditation and deliberation. (CT 196.) The great bodily injury allegation was found to be true. (CT 197.) The jury further found the special circumstances allegation that the murder was committed during the commission of rape. (Pen. Code, § 190.2, subd. (a)(17)(iii)) to be true. (CT 198.) On February 19,

2. The designation "CT" refers to the Clerks Transcript. The designation "RT" refers to the Reporter's Transcript.

1982, the jury fixed the penalty on count I as death. (CT 314.) On February 22, 1982, the automatic motion to modify the jury's verdict to life imprisonment without parole (Pen. Code, § 190.4, subd. (e)) was denied. The court sentenced respondent to death on count I. As to count II, respondent was sentenced to state prison for the upper term of eight years with a five-year enhancement for the great bodily injury allegation plus a five-year enhancement for the first prior, the term on count II to run consecutively to count I but stayed pending appeal on count I. (CT 324, 335-337.)

On an automatic appeal to the California Supreme Court, the judgment of

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guilt and a finding of a special circumstance was affirmed. The penalty judgment was reversed.

STATEMENT OF FACTS

A. Guilt Phase

On October 28, 1980, at approximately 7:30 a.m., 15 year-old Susan Jordan and her minor sister (Karen) and brother (James) left their house located at 9946 Victoria Avenue in Riverside. (16 RT 4079-4082, 4090.)

Angelina Jordan, Susan's mother, called home from work at about 3 p.m. that day to check on Susan and the other children. Karen answered the telephone and told Mrs. Jordan that Susan had not come home. (16 RT 4094-4095.) Mrs. Jordan drove to the Arlington High School and looked for Susan.^{3/} She could

3. It was later determined Susan did not attend school that day. (21 RT 5211.)

not locate her so she drove home. Susan was not at home. (16 RT 4097-4100.) Mrs. Jordan became concerned and began checking around the neighborhood for Susan. (16 RT 4100-4104.)

Mrs. Jordan returned home and at about 7 p.m. the telephone rang. Mrs. Jordan answered it and a male voice said, "Hello, Mrs. Jordan. Susie isn't home from school yet, is she?" Mrs. Jordan replied, "No, she isn't." The male voice then said, "You will never see your daughter again. You can find her body on the corner of Victoria and Gibson." She asked the caller to repeat it and he did. She pleaded with him not to hang up, but he did. (16 RT 4105-4106.) Mrs. Jordan subsequently called the police. (16 RT 4107.)

At 7:31 p.m. a telephone call was received at the Riverside Police

Department. A male caller said, "On the corner of Gibson and Victoria, fifth row, you will find a white Caucasian body of a young girl in the orange grove." Thereafter, the caller hung up. (19 RT 4650-4653.)

Police officers were sent to the orange grove. A search of the orange grove commenced but did not turn up anything. (19 RT 4608, 4657-4659, 4660.) Mrs. Jordan later informed a police officer of the anonymous phone call she had received earlier that evening. Shortly thereafter the telephone rang and the officer answered it. (19 RT 4612.) A male voice said, "Is this the Jordan house or the Jordan residence?" He replied, "Yes." The male caller then said, "You can find Sue's identification in a telephone booth at the Texaco station at Arlington and Indiana." (19 RT

4613.) The caller then hung up. (19 RT 4614.)

Officer Taulli later arrived at the orange grove and a dog named Nikky sniffed Susan's clothing. Nikky began to search the grove. (19 RT 4662.) Shortly thereafter, Nikky led police to a pair of torn panties inside the grove. Nikky then went down to the next six rows where Susan's body was found. Susan's body was face down and dirt was piled up on each side of her head. Police secured the area (19 RT 4665-4669) and homicide detectives were called to the scene. (19 RT 4663-4664, 4673-4674, 4689.) Susan's body was nude except for a pair of socks, a blouse, and a bra partially pulled out from under the blouse. Six footprints of what appeared to be tennis shoes were located near the body and photographed. (19 RT 4678-4682.)

Meanwhile, a tape recorder and a telephone recording device were obtained and connected to the Jordans' telephone. (18 RT 4457-4458.) At about 8:40 p.m. the phone rang and he answered it. A male voice said, "In the tenth row you'll find the body." (18 RT 4458-4459.)

Police officers were sent that night to a telephone booth located at the Texaco station at the intersection of Arlington and Indiana. (19 RT 4623.) A search of the booth revealed two Arlington High School identification cards belonging to Susan Jordan and an envelope or library pouch from some type of school book. (19 RT 4626, 4634, 4786-4787; 20 RT 4861-4863.) Stamped across the envelope were the words "Arlington High School." (20 RT 4863.)

In the early morning of October 29, 1980, police officers set up road

blocks on the streets surrounding the area of the orange grove. Police stopped passerbys and questioned them regarding the killing of Susan. (19 RT 4726-4727.) As a result of the roadblock, police obtained information from several individuals. Among them was Wylie Eng, a student at Arlington High School. (17 RT 4119-4120, 4159.) Eng indicated he normally saw Susan walking to school and that he usually passed her on his bicycle. On the morning of October 28, 1980, he left home for school at about 7:30 a.m. While en route to school, he saw Susan walking toward Van Buren Boulevard and then onto the bike trail toward Gibson Street near the orange grove. She was carrying her books. (17 RT 4123-4131.) As Eng approached Gibson Street, he saw a black man wearing green shorts and a green and white baseball

shirt approaching the bike trail from Gibson Street. (17 RT 4132-4133.) Near the intersection of Gibson and Victoria Streets Eng saw a copper colored Trans-Am, new model, parked on Gibson Street. (17 RT 4136-4137.)

Eng subsequently was shown a photo lineup and he picked out respondent's photo as the man he saw on the morning of October 28, 1980, near the orange grove. (17 RT 4177; 21 RT 5225.)

Julie Pim, another Arlington High School student, was also interviewed by police. On the morning of October 28, 1980, at about 7:30 a.m. she and her brother left for school. As they drove by the intersection of Victoria Street and Van Buren Boulevard, she saw Susan cross the intersection and continue walking toward Gibson Street. Susan was carrying her books up against her chest.

(17 RT 4179-4186.) She saw a black man standing on the curb near the intersection of Victoria Street and Van Buren Boulevard. He wore green shorts and a white and green top. (17 RT 4187.) Pim picked out respondent's photo from a police photo lineup. (17 RT 4227, 4239, 4241; 21 RT 5223-5224.) She identified respondent at the preliminary hearing and at trial as the man she saw that morning near the orange grove. (17 RT 4188, 4232, 4242.)

Lonnie Boozell drove his daughter to school on the morning of October 28, 1980. He saw Susan walking near Van Buren Boulevard and Gibson Street. She was carrying her books. Approximately 70 feet from Susan he saw a black man behind a tall tree between Van Buren Boulevard and Gibson Street. The man had

jogging clothes on and appeared to be jogging in place. (17 RT 4245-4253.)

Henry Garcia and Joseph Yancey carpooled to work on the morning of October 28, 1980. While driving on Victoria Street near Van Buren Boulevard, they saw Susan walking. Approximately 15 feet behind her they saw a black man wearing jogging clothes (i.e., shorts). (17 RT 4278-4291, 4319-4327.) At trial Garcia identified respondent as being similar to the man he saw walking behind Susan that morning. (17 RT 4292.)

Marsha Johnson informed police she had driven by the area on the morning of October 28, 1980. She saw a newer model dark brown Trans-Am parked on Gibson Street. The license plate was a dealer paper plate which had "Made in America" written on it. (18 RT 4337-4345.)

Raymond Rogers was also in the area of Gibson and Victoria Streets at about 7:40 a.m. on October 28, 1980. He saw a "Pontiac or Camaro" parked on "Gibson with a license plate that read "Made in USA" or "Made in America." (18 RT 4364-4371, 4384-4389.)

Michael Cornell, another Arlington High School student, also saw a Trans-Am parked on Gibson Street on the morning of October 28, 1980. The license plates read "Made in America." (18 RT 4397-4414.) At trial he identified respondent's vehicle as being similar to the car he saw that morning. (18 RT 4414.)

Peter Rodriguez saw a brown Trans-Am parked on Gibson Street on the morning of October 28, 1980. It had an unusual license plate which read "USA" or "America" on it. (18 RT 4468-4472.) He

saw a black man come out of the area of the orange grove and walk around to the driver's side of the Trans-Am. The man thereafter opened the trunk area of the vehicle. The individual kept staring at Rodriguez. (18 RT 4476-4477.) At trial Rodriguez identified respondent's vehicle as being similar to the Trans-Am he saw that day and testified respondent looked similar to the man he saw but he was not certain. (18 RT 4475, 4480 4481.)

Margery Johnston, a county employee, rode her bicycle to work on the morning of October 28, 1980. As she rode on the bike path adjacent to the orange grove on Gibson and Victoria Streets, she saw a black man wearing jogging clothes come out of the orange grove. He appeared startled and his legs were dirty and dusty. (23 RT 5600-5608.) She also

saw a brown sports car parked near the area. (23 RT 5610-5611.) At trial Mrs. Johnston positively identified respondent as the man she saw that day. (23 RT 5609-5612.)

On the basis of the information obtained by police from the various witnesses police initiated a surveillance of respondent and his residence on Gertrude Street. (20 RT 4843.) On November 6, 1980, police saw respondent drive up to his residence in a brown Trans-Am. (19 RT 4805-4806.) Subsequently, respondent drove from his residence and was eventually stopped and arrested by police. (19 RT 4807.)

A search warrant for respondent's residence on Gertrude Street was obtained. (20 RT 4847, 4875.) A search of the garage area revealed a paper license plate behind a water heater. The license

plate read "Made in America."^{4/} (20 RT 4848, 4877; 22 RT 5446.) A search of the interior of the residence revealed a Pacific Telephone directory with a page folded back where the listing for the Jordan residence was located. (20 RT 4886-4887.) Police found and seized a book entitled "ALM Spanish Book" with Susan Jordan's signature inside the cover. (20 RT 4889-4890; 23 RT 5640.) Police also located underneath a bed two newspaper articles relating to Susan's death. (20 RT 4881-4885.)

Shortly after completing the search of respondent's house, police went to respondent's place of employment, armed with a search warrant for his locker. (20 RT 4850.) Police searched his locker

4. Respondent had the plate on his Trans-Am in October of 1980. (18 RT 4505, 4518; 22 RT 5445-5446.)

and seized a pair of running shorts, a pair of green jogging shorts, a white and green jersey, boxer shorts, a pair of socks, a brown shirt, and some rags. (20 RT 4852-4856.)

Subsequent to the search of respondent's residence, police learned that Susan had checked out a book entitled "The Citadel." (21 RT 5228, 5242.) Police obtained another search warrant for appellant's residence. Police seized "The Citadel" from appellant's residence. (20 RT 4891-4892.)

(20 RT 4998-5001; 21 RT 5242.)

An autopsy of Susan's body revealed bruises on the nose, back area, right arm, neck, and head. The nature of the bruises suggested she was alive at the time she suffered these injuries. (22 RT 5365-5391.)

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At trial William Anderson and Norm Gibson, who were acquainted with respondent, identified the voice of the caller to the Jordan residence on October 28, 1980, and tape recorded by Chaplain Morgan, as being that of respondent. (22 RT 5449, 5453.)

B. Defense

Respondent's defense at the guilt phase was one of alibi. (23 RT 5775-5780.)

C. Penalty Phase

On October 14, 1977, at about 8 a.m., 14 year-old Kelly Porterfield was alone at her home in Riverside. She was preparing to leave for school and, as she walked down the hallway from her bedroom, someone threw a coat over her head. (25 RT 6187-6195.) Her assailant took her into the bedroom and began choking her. He threatened to kill her if she did not

comply with his wishes. (25 RT 6198-6200.) She tried to get away but to no avail. He choked her to the point of unconsciousness. She regained consciousness and he took off her clothes. (25 RT 6205-6206.) He threw her on the bed and raped her. Thereafter, the assailant left the premises. (25 RT 6207-6212.)

Respondent was subsequently arrested and charged with the rape of Kelly. He pled guilty to the rape and was sentenced to state prison. (25 RT 6213-6216.) He was released from prison on June 14, 1980, and placed on parole for a period of one year. (25 RT 6219-6220.)

D. Defense

Several of respondent's relatives testified regarding his background and personality. They found it hard to

believe respondent would commit such a heinous crime. (25 RT 6238-6300; 26 RT 6353-6374.)

Dr. Summerour, a psychiatrist, testified respondent was legally sane and did not suffer from organic brain damage. (26 RT 6387-6396.) He opined that respondent was ashamed and afraid to face his problem (i.e., sexual dysfunction). Further, that in his opinion after respondent raped Susan Jordan he formulated the intent to kill her and did so because he could not face her. That is, killing her with her face down and covering her face was his response to his emotions of shame and fear. (26 RT 6415-6418, 6461.)

SUMMARY OF ARGUMENT

At the penalty phase of the trial the jury was instructed with a

modified version of CALJIC No. 8.84.^{5/}
This instruction advised the jury it must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Giving this instruction at the penalty phase of a capital case was consistent with federal constitutional law.

In Gregg v. Georgia (1972) 428 U.S. 153, 189, this Court noted Furman v. Georgia (1972) 408 U.S. 238, mandated that where discretion is given a sentencing body on a matter so grave as the determination of whether a human life should be taken, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

5. "CALJIC" is an acronym for standard jury instructions used in criminal cases in California. The instructions are drafted by a committee of California judges.

This Court has also noted a death penalty law must permit the trier of fact to consider mitigating evidence presented by the defendant surrounding the offense and the offender. (Lockett v. Ohio (1978) 438 U.S. 586, 604; Eddings v. Oklahoma (1982) 455 U.S. 104, 113-115.)

An instruction as given here , telling the jury not to be swayed by mere sympathy is consistent with the requirement discretion be suitably limited and the defendant be permitted to present all relevant mitigating evidence concerning the offense and the offender.

The instruction simply tells the jury not to decide the case based upon unfettered or untethered emotion unrelated to the facts and circumstances of the offense or the offender. Rather, the jury is to determine the punishment

based upon an analysis of the facts and circumstances of the case as related to the offense and the offender.

The instruction consequently avoids the very problem addressed in Gregg and Furman -- unfettered and arbitrary decision making by the trier of fact unrelated to the facts of the case or the character and record of the defendant. In addition, the instruction precludes the jury from determining the penalty without standards and in the arbitrary and capricious manner this Court condemned in Roberts v. Louisiana (1976) 428 U.S. 325. Moreover, the instruction does not preclude the jury from considering relevant mitigating evidence bearing on the offense or the offender as mandated by Lockett v. Ohio, supra, 438 U.S. at p. 604.

The instruction also is a benefit to a defendant facing the death penalty as it tells the jury not to be swayed by sympathy for anyone and thus precludes the jury from being swayed by sympathy for the victim or the victim's family to the detriment of the defendant.

Moreover, under the California death penalty law, the jury was instructed with CALJIC No. 8.84.1 which directed the jury to consider various factors relating to the offense or the offender. Subsection (k) of the instruction indicates the jury may consider any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. CALJIC No. 8.84.1 thus assures the jury will consider all relevant evidence relating to the offense and the offender as mandated by this Court. Indeed, CALJIC No. 8.84.1

is a virtual restatement of California Penal Code section 190.3 which this Court has concluded allows the jury to consider all matters relevant to the offense and the offender. (California v. Ramos (1983) 463 U.S. 992, 1005, fn. 19.)

The sympathy instruction also advises the jury to render a just verdict regardless of the consequences. This provision of the instruction also is consistent with federal constitutional principles. It tells the jury not to consider unrelated facts, emotions, or consequences, but simply to weigh the facts relating to the offense and the offender. This is consistent with Lockett and Eddings and comports with the mandate of Furman.

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Consequently, it is clear
instructing the jury with a modified ver-
sion of CALJIC No. 8.84 did not violate
the federal Constitution.

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ARGUMENT

I

IT DOES NOT VIOLATE THE FEDERAL
CONSTITUTION FOR THE TRIAL COURT
TO INSTRUCT THE JURY AT THE PENALTY
PHASE OF A CAPITAL CASE THAT THE
JURY IS NOT TO BE SWAYED BY MERE
SENTIMENT, CONJECTURE, SYMPATHY,
PASSION, PREJUDICE, PUBLIC OPINION
OR PUBLIC FEELING

The issue presented in this
case is whether it constitutes federal
constitutional error to instruct the jury
at the penalty phase of a death penalty
trial not to be swayed by mere sympathy,
passion, prejudice, public opinion, or
public feeling where the defendant has
been permitted an unlimited opportunity
to present mitigating evidence and the
instruction merely advised the trier of
fact to not consider matters not relevant
to the offense or the offender.

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A. History and Background
of the Instruction

It is standard practice in California to instruct the jury in a criminal trial with CALJIC No. 1.00 which advises the jury of its duties. Indeed, the instruction was given with other guilt phase instructions in this case. (CT 212-213.)

The last paragraph of this instruction advises the jury that:

"You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences will be." (CT 212-213; RT 6559; JA 20.)

At the penalty phase the court instructed the jury with a modified version of CALJIC No. 8.84. This instruction

generally advises the jury of its duties at the penalty phase. As modified in this case, it also contained a paragraph similar to that contained in CALJIC No. 1.00 concerning sympathy. The instruction reads as follows:

"The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under a special circumstance has been specially found to be true.

"It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance charged in this case has been specially found to be true.

"Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.

"You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice,

public opinion or public feeling. Both the People and the defendant has (sic) right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be." (CT 319; emphasis added; RT 6558-6559; JA 20.)

In 1965 and again in 1966 the California Supreme Court concluded a similarly worded instruction was not to be given at the penalty phase of a death penalty case. (People v. Anderson (1966) 64 Cal.2d 633, 641; People v. Polk (1965) 63 Cal.2d 443, 451.) The court held that it was error to instruct the jury at a penalty phase not to consider sympathy for the defendant in reaching its verdict since this was a valid factor for consideration in fixing punishment. - (People v. Friend (1957) 47 Cal.2d 749, 767-768)

The court reached the same conclusion in People v. Bandhauer (1970) 1 Cal.3d 609, 618.

Bandhauer and the other cases were decided under the death penalty law in existence prior to 1972. However, this law was invalidated by the California Supreme Court in 1972 in People v. Anderson (1972) 6 Cal.3d 628, 656. There the California Supreme Court held the death penalty was cruel or unusual within the meaning of the California Constitution.

In November of 1972, the People of California adopted a constitutional amendment (Cal. Const., Art. I, § 27) to restore the death penalty. (See Gregg v. Georgia, supra, 428 U.S. 153, 181.) Pursuant to that constitutional authorization, and after this Court's decision

in Furman v. Georgia, supra, (1972), 408 U.S. 238, the California Legislature adopted statutes providing a mandatory death penalty for certain aggravated forms of murder and other offenses. (Cal. Stats. 1973, Ch. 719.)

After this Court's elucidation of Furman in Gregg v. Georgia, supra, and the other cases decided the same day, California's mandatory statutes were found to be invalid by the California Supreme Court. (Rockwell v. Superior Court (1976) 18 Cal.3d 420, 445.)

By emergency legislation effective August 11, 1977, (Cal. Stats. 1977, Ch. 316), the California Legislature adopted new capital sentencing procedures. That legislation was upheld by the California Supreme Court. (People v. Frierson (1979) 25 Cal.3d 142, 172-184;

People v. Jackson (1980) 28 Cal.3d 264, 315-317; People v. Harris (1981) 28 Cal.3d 935, 964.)

Meanwhile, on November 7, 1978, the voters of California adopted Proposition 7, an initiative statute. That is the law now in effect in California. (See generally Pen. Code, §§ 190.1-190.4.) Respondent here was tried under this 1978 death penalty law.

Under the 1978 death penalty statute, once the defendant stands convicted of a first degree murder and the jury has found one or more charged special circumstances to be true, the case proceeds to a penalty trial at which the jury must decide only between two possible punishments, death or life imprisonment without the possibility of parole. (Pen. Code, §§ 190.2, 190.3.) The jury in making this decision is to

consider, take into account, and be guided by evidence of enumerated aggravating and mitigating circumstances introduced at the penalty phase or gleaned from the earlier guilt trial. The law also provides that if the jury finds the aggravating circumstances outweigh the mitigating circumstances, it shall impose a sentence of death. (Pen. Code, § 190.3; People v. Brown, supra, at p. 538.^{6/}

6. The California Supreme Court concluded in this case the provision that the jury shall impose the death penalty if it found the aggravating circumstances outweighed the mitigating circumstances comported with the federal Constitution only if the provision was interpreted to give the jury the discretion to not impose the death penalty if it did not feel punishment was appropriate. (People v. Brown, supra, at pp. 544-545, fn. 17.) Respondent also petitioned this Court to grant certiorari on this issue in this case on the ground the decision was in conflict with prior decisions of this Court. (See Jurek v. Texas (1976) 428 U.S. 262; Profitt v. Florida (1976) 428 U.S. 242; Zant v. Stephens (1983) 462 U.S. 862, 874.) However, this court has declined to grant certiorari on this issue.

During the penalty phase of a case tried under the 1978 law, the jury is given two other essential instructions. They are CALJIC No. 8.84.1 and CALJIC No. 8.84.2. These instructions read as follows:

CALJIC No. 8.84.1

"In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the recent proceeding and the existence of any special circumstance[s] found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of

force or violence or the expressed or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [sic] of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (RT 6559-6560; JA 20-23.)

CALJIC 8.84.2

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

"After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a

sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

"You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

"Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom." (RT 6560-6562; JA 23-24.)

The California Supreme Court dealt with the validity of giving the sympathy instruction at the penalty phase under the 1977 death penalty law in People v. Easley (1983) 34 Cal.3d 858, 875. In Easley the trial court gave the jury CALJIC No. 1.00 at the penalty phase. On appeal the State argued that Bandhauer and the cases upon which it

relied were no longer valid because the jury did not have unlimited discretion to exercise discretion as it did in California before decisions by this Court in Furman v. Georgia, supra, 408 U.S. 238, and Gregg v. Georgia, supra, 428 U.S. 153. Furman and Gregg indicated the discretion of the jury at the penalty phase must be somewhat circumscribed. The California Supreme Court, however, rejected this contention noting the instruction violated Eddings v. Oklahoma, supra, 455 U.S. 104, and Lockett v. Ohio, supra, 438 U.S. 586, as these cases make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any sympathy factor raised by the evidence before it. (Id., at p. 876.)

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The California Supreme Court reached the same conclusion in People v. Lanphear (1984) 36 Cal.3d 163, 165. In the instant case which was tried under the 1978 law, the court again found it was error to instruct the jury with CALJIC Nos. 1.00/8.84 at the penalty phase. (See too People v. Leach (1985) 41 Cal.3d 92, 111; People v. Montiel (1985) 39 Cal.3d 910, 928.) The court also rejected the argument presented by the state here as had been presented in Lanphear, supra, that the giving of CALJIC No. 8.84.1 eliminated any prejudice to a defendant. CALJIC No. 8.84.1, subdivision (k), provides the jury may consider any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. Petitioner argued the jury could consider

any factor in mitigation and thus would consider sympathy if appropriate.

The California Supreme Court concluded CALJIC No. 8.84.1(k) was also ambiguous and this instruction when combined with the anti-sympathy warning would divert the jury from its constitutional duty to consider any sympathetic aspect of the defendant's character or record whether or not related to the offense for which he is on trial in deciding the penalty. (People v. Brown, supra, 40 Cal.3d at p. 537.)

B. Argument

At the penalty phase of the trial the jury was instructed with a modified version of CALJIC No. 8.84 which advised the jury that it "must not be swayed by mere sentiment, conjecture,

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sympathy, passion, prejudice, public opinion or public feeling." The prosecutor made similar arguments, both during the voir dire of jurors and at the close of the penalty case. (People v. Brown, supra, 40 Cal.3d p. 537.)

Giving the instruction at the penalty phase was consistent with federal constitutional law.

In Furman v. Georgia, supra, 408 U.S. 238, this Court held the death penalty could not be imposed under sentencing procedures that created a substantial risk the death penalty would be imposed in an arbitrary and capricious manner. Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be

suitably directed and limited in order to minimize the risk of wholly arbitrary and capricious action. (Gregg v. Georgia, supra, 428 U.S. 153, 188-189.)

In Gregg v. Georgia, supra, at p. 195, this Court observed that,

"In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (Gregg v. Georgia, supra, at p. 195.)

In response to the concerns of Furman expressed by this Court, some states took all discretion away from the jury and enacted statutes which required the

jury impose the death penalty if it concluded the defendant had committed a certain crime. (Woodson v. North Carolina (1976) 428 U.S. 280.) This Court concluded such laws do not fulfill Furman's basic requirement of replacing arbitrary and wanton jury discretion with objective standards to guide, regulate, and make rationally reviewable the process of imposing a death sentence. (Id., at p. 303.) Moreover, such laws do not permit particularized consideration of relevant aspects of the character and record of each convicted defendant before imposition of the death sentence. (Id. at p. 303.)

Since Woodson, this Court has repeatedly noted the touchstone of a valid death penalty law is that it permit the trier of fact that is to determine death be able to consider the facts

surrounding the offense and the offender. (Lockett v. Ohio, supra, 438 U.S. at p. 604; Eddings v. Oklahoma, supra, 455 U.S. at pp. 113-115.)

Indeed, in Lockett and Eddings this Court observed that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death. (Lockett v. Ohio, supra, at p. 604.)

Thus, in essence, this Court has concluded in Furman a trier of fact is not to be given unlimited or arbitrary discretion in determining whether to impose the death penalty. In addition, after Lockett and Eddings the trier of

fact may be permitted to consider the penalty only after consideration of any aspects of the defendant's character or record or any circumstance of the offense the defendant proffers as a basis for a sentence less than death.

The California Supreme Court in this case concluded that admonishing the jury not to be swayed by mere sympathy in argument, voir dire, or by instructions, violates Lockett and Eddings as it precludes the jury from considering mitigating evidence relating to the offender. However, this holding misreads Furman, Lockett, and other decisions of this Court.

The sympathy instruction given here simply tells the jury not to be swayed by mere sentiment, sympathy, conjecture, passion, prejudice, public opinion or public feeling. This means the

trier of fact is not to decide the case based upon unfettered or untethered emotions unrelated to the facts and circumstances of the offense or the offender. Rather, the trier of fact is to determine the punishment based upon an analysis of the facts and circumstances of the case as related to the offense and the offender.

Such an instruction is consistent with Furman v. Georgia, supra, as it tells the jury not to arbitrarily decide the punishment based on factors unrelated to the facts and circumstances of the case or the offender, and based solely on emotion. Indeed, the instruction advises the jury to avoid the very problem addressed in Furman: unfettered and arbitrary decision making by the trier of fact unrelated to the facts of the case or the character and record of the defendant.

Such an instruction also is consistent with the decision of this Court in Roberts v. Louisiana (1976) 428 U.S. 325. In Roberts, a post-Furman case, a plurality of this Court struck down a Louisiana death penalty law that required the death penalty be imposed if the trier of fact convicted the defendant of first degree murder, but permitted the jury, without any standards or evidence of lesser included offenses, to find the existence of the lesser included offenses of second degree murder or voluntary manslaughter as a means of showing mercy. This Court concluded this procedure resulted in standardless and arbitrary and capricious decision making by the trier of fact contrary to the dictates of Furman.

Roberts makes it clear while a trier of fact is to consider as

mitigating evidence any aspect of the defendant's character or circumstances relating to the offense, the trier of fact does not have unlimited discretion to render a verdict based on sympathy or emotion unrelated to the facts of the case.

Indeed, Lockett v. Ohio, supra, 438 U.S. at p. 604, fn. 12, makes it self-evident the trier of fact is only to consider evidence bearing on the offense and the offender that is relevant to the facts of the case and the offender. "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or circumstances of the offense."

The giving of a modified version of CALJIC No. 8.84 did not violate the federal constitution. It precluded the jury from being swayed by

mere emotion unrelated to the fact of the case or the offender which could result in arbitrary and capricious decision making. Instead, it limited the jury to a consideration of the facts and circumstances of the case relevant to the offense and the offender as mandated by Roberts and Lockett.

For example, the instruction precludes the jury from being unduly swayed for or against a defendant in the penalty determination because of matters which deserve no consideration such as race, good looks, or social status. One jury may be overly sympathetic to a defendant because he appears to have boyish good looks or is from a well respected family. By contrast, a jury may be unduly harsh on a defendant because of his race, physical appearance, or because he is a blue collar worker.

Advising the jury not to be swayed by sympathy, passion, or prejudice focuses the jury on the evidence bearing on the offense and relating to the character of the offender, and not matters which deserve no consideration in the punishment determination.

Moreover, the jury was instructed in this case with CALJIC No. 8.84.1 which allowed the jury to consider various factors relating the offense and the offender. Subsection (k) of this provision indicates the jury may consider any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC No. 8.84.1 thus allowed the jury to consider all relevant evidence relating to the offense and offender as mandated by this Court in

Lockett and Eddings, while CALJIC No.

8.84 cautioned the jury to not be swayed by mere emotion and thereby precluded the jury from making an arbitrary and capricious decision as condemned by this Court in Furman and Roberts. Thus, CALJIC No. 8.84 was properly given here and is consistent with the holdings of this Court. Moreover, admonitions to the jury not to be swayed by mere sympathy or emotion were also proper.

However, the California Supreme Court has suggested CALJIC No. 8.84.1, subdivision (k) might not comport with federal constitutional standards as it does not permit the trier of fact to consider mitigating evidence relating to the offender but only that relating to the offense.

But, the language of subsection (k) clearly indicates it deals with any circumstance mitigating the offense

including those involving the offender. In addition, CALJIC No. 8.84.1 as given is essentially a restatement of Penal Code section 190.3 and this Court has concluded 190.3 is consistent with Lockett. Thus, CALJIC No. 8.84.1 as given measures up to the standards in Lockett and deals with the offense and offender as well.

As this Court noted in California v. Ramos (1983) 463 U.S. 992, 1005, fn. 19:

"We note further that respondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of

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Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops.3d 26 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case. Cal. Penal Code Ann. § 190.3 (West Supp. 1983)."

Thus, any argument regarding defects in CALJIC No. 8.84.1 is meritless here. In addition, nothing in the instruction precludes the jury from considering any mitigating factor that might not be mentioned by the statute or the instruction.

In addition, this Court upheld a similar version of section 190.3 under the 1977 law and the entire 1977 California death penalty law in Pulley v. Harris (1984) 465 U.S. 37, 53, noting that:

"By requiring the jury to find at least one special circumstance beyond a reasonable

doubt, the statute limits the death sentence to a small sub-class of capital-eligible cases. The statutory list of relevant factors, applied to defendants within this sub-class, 'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty.' *Harris v. Pulley*, 692 F.2d, at 1194, 'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate,' *id.*, at 1195. The jury's 'discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' *Gregg*, 428 US, at 189, 49 L Ed 2d 859, 96 S Ct 2909. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system, without any requirement or practice of comparative proportionality review cannot be successfully challenged under Furman and our subsequent cases." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 53; emphasis added.)

Accordingly, under the instructional scheme of this case, CALJIC No. 8.84.1 allowed the jury to consider all relevant mitigating evidence relating

to the offense and the offender. The sympathy instruction on the other hand precluded the jury from rendering a verdict of death based on untethered emotions or sentiment. Thus, it and similar admonitions were properly given in this case as a means of precluding the jury from rendering an arbitrary and capricious finding.

Consequently, the California Supreme Court's conclusion that the trial court improperly instructed the jury with the modified version of CALJIC No. 8.84 is erroneous. The instruction instead was consistent with the dictates of the Eighth and Fourteenth Amendments and the decisions of this Court. Indeed, it was used to preclude the very problems raised by this Court in Furman. "It is of vital importance to the defendant and to the community that any decision to impose the

death sentence be, and appear to be, based on reason rather than caprice and emotion." (Gardner v. Florida (1977) 430 U.S. 349, 358.)

As Justice Mosk, of the California Supreme Court, noted in his dissenting opinion in People v. Lanphear, supra, 36 Cal.3d at p. 170.

"Where my colleagues go wrong is in their conclusion that elimination of sympathy as a factor somehow prevents the jury from weighing mitigating circumstances. Nothing could be further from reality. The jurors were instructed by the court to 'consider all the evidence which has been received during the trial,' and they were further advised specifically to weigh the aggravating and mitigating circumstances 'that you find to be established by the evidence.'

"The defendant presented all the evidence he could muster regarding his unfortunate background and certain purported redeeming qualities of character. Those were his mitigating circumstances.

Sympathy, on the other hand, is not a characteristic of the defendant; it is an emotion of the jurors. Thus, when jurors were cautioned not to be swayed by sympathy, they were not being instructed to ignore thoughtful and dispassionate consideration of the defendant's proffered mitigation. They were merely admonished to employ reason, not emotion. That is sound advice in a court of law. Justice Cardozo reminded us: 'The balance is swayed, not by gusts of fancy, but by reason.' (Cardozo, Growth of the Law (1924) p. 58.)

"What my learned colleagues fail to comprehend is that if jurors are permitted -- indeed, encouraged -- to entertain emotion in assessing penalty, in most instances they are likely to order death for the miscreant." (People v. Lanphear, supra, 36 Cal.3d at p. 170, emphasis added.)

Support for our position may be found in cases from other jurisdictions that have concluded the giving of a similar

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type of instruction was proper.) (People v. Stewart (Ill. 1984) 473 N.E.2d 1227; People v. Perez (Ill. 1985) 483 N.E.2d 250, 260-261; Brewer v. State (Okla. Cr. 1982) 650 P.2d 54, 60-61; State v. Chafee (S.C. 1984) 328 S.E.2d 464, 470; see too State v. Watson (La. 1984) 449 So.2d 1321, 1331-1332.)

In addition, it must be noted the instruction does not advise the jury to be prejudiced against the defendant, but speaks in general terms about not being swayed by sympathy. Thus, the instruction also advises the jury not to be swayed by sympathy for the victim or the family of the victim and thus aids the defendant in receiving a fair trial. As Justice Mosk noted in his dissenting opinion in People v. Lanphear, supra, at 36 Cal.3d 163, 170:

"I continue to adhere to the views expressed in my dissent in People v. Bandhauer (1970), 1 Cal.3d 609, 619 (citations) and in my dissent in People v. Easley, supra, 34 Cal.3d at page 886: 'In the current climate of public opinion, sympathy is more likely to be aroused for the victim and his family than for a defendant who has been found guilty of a brutal first degree murder. Thus cautioning a jury in the penalty phase of the trial not to be swayed by mere sympathy redounds to the benefit, not the detriment, of the defendant.'"

The courts in Oklahoma (see Brewer v. State, supra), and South Carolina (see State v. Chafee, supra), have reached similar conclusions.

In People v. Brown, supra, 40 Cal.3d at p. 538, fn. 7, the California Supreme Court also concluded the portion of CALJIC No. 8.84 which advised the jury to render a just verdict regardless of the consequences would be understood by

the jury in the same light as an instruction to disregard sympathy and thus indicated this part of CALJIC No. 8.84 should not be given.

However, as noted with regard to the other provision of this instruction, it does not violate the federal Constitution to advise the jury to render a just verdict regardless of the consequences. The instructions tells the jury not to consider unrelated facts, emotions, or consequences, but to simply weigh the facts relating to the offense and the offender. This is consistent with Lockett and Eddings and comports with the mandate of Furman that the jury not have untrammelled discretion.

Thus, it is clear instructing the jury with CALJIC No. 8.84 did not violate the United States Constitution.

CONCLUSION

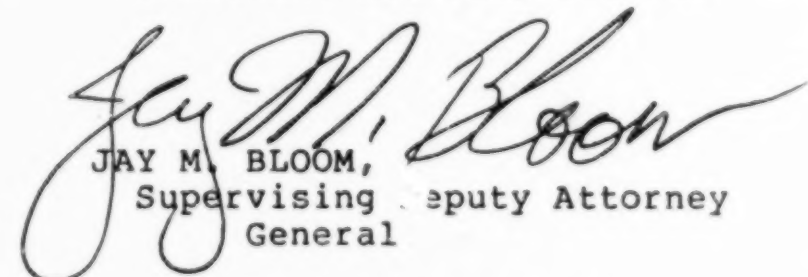
For all the foregoing reasons
Petitioner State of California respectfully requests the judgment of the
California Supreme Court be reversed
insofar as it reverses the penalty of
death and that the cause be remanded to
that Court for further proceedings.

Respectfully submitted,

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APPENDIX

- A-1 -

CALIFORNIA STATUTE

PENAL CODE

§ 190.2

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall

be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver,

or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

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(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

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(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the

local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscience-

less, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral Copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

§ 190.4

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special

circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the

finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special

circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of

fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026,

the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the

defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of a death penalty verdict

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pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

Penal Code section 190.3

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony

conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

/

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in

rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which

involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of

counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

(Added by § 8 of Initiative Measure approved Nov. 7, 1978.)

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 85-1563
October Term, 1985

JOHN K. VAN DE KAMP
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the State of California
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Petitioner,

110 West A Street, Suite 700
San Diego, California 92101

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF THE MERITS as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Robert Scarlett
Monica Knox
Deputy State Public Defenders
107 South Broadway, Suite 9111
Los Angeles, CA 90012

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 14 day of July 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 14, 1986.

Subscribed and sworn to before me
this 14th day of July 1986.

Brenda J. Locke
Notary Public in and for said County and State

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.



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No. 85-1563

Supreme Court, U.S.
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SEP 5 1986
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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
ALBERT GREENWOOD BROWN, JR.,
Respondent.

On Writ Of Certiorari To The
Supreme Court of California

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether an instruction at the penalty phase of a capital trial directing the jury not to be swayed by sympathy violates the Eighth and Fourteenth Amendments where the defendant has presented mitigating evidence and has focused his plea for a sentence less than death on the jury's consideration of the sympathetic aspects of his background and character.

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STATEMENT OF THE CASE

Respondent accepts the state's statement relative to the guilt trial. The issue presented in this case, however, requires a more detailed statement relative to the evidence from the penalty trial.

Aggravating Evidence

In 1977, respondent entered a Riverside home intending to burglarize the place. He found fourteen-year-old Kelly home alone. Respondent raped the girl and left; he was arrested within minutes. (RT 6188-6210, 6394, 6497.) Respondent was charged with rape. He pleaded guilty to avoid causing Kelly the additional pain of having to testify at trial. (RT 6499.)¹ Respondent was sentenced to prison, where he served over three years before he was paroled. (RT 6216).

Mitigating Evidence

In an effort to "allow people on the jury to get to know [respondent] as a person" (JA 52), ten members of his family testified. His parents, stepsiblings, cousins, aunts, and uncles indicated respondent was a quiet, attentive, loving child, teenager, and young adult who tried hard to be accepted by others. (JA 38-39, 40, 46, 50, 54; RT 6240, 6261, 6273, 6290.) Respondent's parents divorced when he was six years old; the divorce was very acrimonious, and respondent's mother did not often allow her son to see his father. (JA 53, 56.)

Respondent joined the Marine Corps when he left high school and served for four years. He wrote regularly to his

¹ When Kelly was called to testify at respondent's penalty trial, respondent chose to stay in the judge's chambers to avoid causing Kelly any pain or discomfort facing him might present. (RT 6171-6172, 6500.)

family, complaining sometimes about the way blacks were treated and of problems he had with the Ku Klux Klan. (JA 60, 63, 69; RT 6246, 6306, 6314, 6362-6366, 6402, 6489-6492.)

It was while respondent was in the Marine Corps that his friends paid for a prostitute for him and he experienced his first sexual encounter. (JA 70; RT 6403, 6413.) Respondent's mother had taught him that sex was "dirty" and if he engaged in "dirty things" with girls, his fingers would fall off and one of his legs would become shorter. (JA 73; RT 6404.) Respondent's uncle was missing one of his fingers, and respondent believed it was because his uncle had done something dirty with girls when he was younger. (*Ibid.*)

Dr. Robert Summerour, a psychiatrist who interviewed respondent several times, testified that relationships with women were very important to respondent. Respondent likes women and wants to protect them but is too afraid to get physically close with them, for he believes his sexual desires are bad. He has experienced a severe impotence problem throughout his life. (JA 70-71; RT 6403, 6408, 6413.)

Dr. Summerour believed respondent's behavior was sexually and not violently motivated and arose from his sexual problems. (JA 70-77; RT 6402-6414.) He believed respondent's criminal activity was motivated by his sexual desires which were impaired by his fear of sexual contact with women. (JA 80; RT 6412.)

Respondent was ashamed and afraid to face his problems. (JA 84; RT 6414.) He felt unable to talk to his father, whom he idealized, about his impotence. (JA 69, 74; RT 6402, 6404); and he believed his mother hated him because he reminded her of his father. (RT 6399, 6402.)

Dr. Summerour indicated respondent exhibited a desire to be caught (RT 6397, 6419) and was ashamed of his criminal conduct to the point he could not face his victims. (RT 6395, 6415, 6461.) The doctor did not believe respondent was a sociopath, pointing out respondent regularly held a job, he valued education, and he maintained close relationships with family members. (JA 82).

Respondent received no treatment for his problems during his prison term for the rape of Kelly. (RT 6417.) His family visited him regularly and respondent wrote letters and sent artwork to his stepbrother and stepsister. (RT 6279, 6286, 6292, 6296, 6374.)

When respondent was paroled, he re-enrolled in college and obtained a job. (RT 6503.) He reported regularly to his parole officer. (RT 6220.)

All respondent's family members testified they loved respondent and would visit him in prison; they asked the jury to show mercy. (JA 52, 68; RT 6270, 6276, 6280, 6293, 6513.)

Respondent, testifying on his own behalf, told the jury he was ashamed of his prior criminal conduct. (RT 6496, 6498-6500.) He asked the jury to show mercy for him. (RT 6507.)

SUMMARY OF ARGUMENT

After being found guilty of murder with special circumstances, and thus death eligible, respondent proceeded to the penalty phase of his trial where the jury would choose between death and life imprisonment without possibility of parole. At the penalty trial, respondent produced much evidence as to his unhappy upbringing and emotional and psychosexual problems. He based his plea for his life on the jury's consideration of the sympathetic aspects of this

background and character evidence and the hope that they would be compassionate and merciful.

There cannot be any real dispute that respondent had a constitutional right to the jury's consideration of this evidence. In a series of cases starting with *Woodson v. North Carolina*, 428 U.S. 280 (1976), this Court has held that the Eighth and Fourteenth Amendments require that the jury "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, 438 U.S. 586, 604 (1978); see also *Eddings v. Oklahoma*, 455 U.S. 104; *Skipper v. South Carolina*, 476 U.S. —, 90 L.Ed.2d 1 (1986).) The state may not, consistent with the Constitution, exclude from consideration "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304.)

Respondent was permitted to introduce all his mitigating evidence. However, the instructions given to the jury, and the argument made by the prosecutor, precluded the jury from considering that evidence. The jury was given a finite list of factors to consider, none of which concern background and character evidence. (JA 20-23.) The jury was then told to confine their consideration to the factors "upon which you have been instructed." (JA 23.) And the jury was expressly cautioned that they were not to be influenced by sympathy. (JA 20.)

In voir dire and in closing argument the prosecutor repeatedly told the jury the law forbade any consideration of sympathy. He advised them that respondent's mitigating evidence was nothing more than a plea for sympathy and mercy and, as such, was entirely irrelevant to the

penalty determination. (JA 29-34, 85-96.) The instructions provided the jury fully supported the prosecutor's argument that respondent's mitigating evidence could not be considered by restricting the jury's consideration to the circumstances of the crime and precluding the consideration of the sympathetic aspects of the background evidence.

The California Supreme Court held that the anti-sympathy instruction, when combined with the other restrictive penalty instructions, was "calculated to divert the jury from its constitutional duty to consider [the background and character evidence]." (*People v. Brown*, 709 P.2d 440, 453 (1985).)

The state contends that the antisympathy instruction means the jury is not to consider only untethered sympathy and that the instructions as a whole advise the jury of their duty to consider evidence relating to the offense or the offender. The instructions, however, do not say what the state contends they mean.

The antisympathy instruction is not restricted to untethered sympathy. It tells the jury not to be swayed by sympathy; that would include, of course, sympathy based on the mitigating evidence as well as untethered sympathy. Yet respondent had a constitutional right to the jury's consideration of their sympathetic and compassionate response to his background and character evidence.

Nor did any of the other penalty instructions advise the jury to consider respondent's mitigating evidence. Rather, all the factors the jury was told to consider and be guided by related, by their express terms, to respondent's present or prior criminal activity. Since the jury was advised to consider only these factors upon which they were instructed, it would be nothing more than specula-

tion to assume the jury considered respondent's mitigating evidence.

The California Supreme Court reviewed the antisympathy instruction in the context of the California capital sentencing scheme and the other penalty instructions. The court considered the ultimate effect of the instructions and the state's experience with them and concluded the instructions operated to divert the jury from its duty to consider the proffered mitigating evidence.

The Attorney General does not dispute the principle that the jury must consider a capital defendant's mitigating evidence. He takes issue only with the California Supreme Court's interpretation of the antisympathy and other instructions. The Attorney General's interpretation of the instructions is totally unsupported by any facts or experience. The court's interpretation, however, is supported by the literal wording of the instructions, by the prosecutor's argument in this case, and by the experience the court has had in other cases with similar instructions.

The California Supreme Court has not purported to go beyond the principles of *Woodson*, *Lockett*, and *Eddings*, which it cited only as defining the jury's duty to consider the mitigating evidence. Nor has it held that the Constitution requires consideration of sympathy factors unrelated to the background and character evidence. The court merely interpreted the instructions as precluding the jury's consideration of sympathy factors based on the mitigating evidence.

This Court has repeatedly encouraged state appellate courts to "mediate federal constitutional concerns and state interests" in the first instance. (*Moore v. Sims*, 442 U.S. 415, 430 (1979); see also *Smith v. Murray*, 477 U.S. —, 91 L.Ed.2d 434 (1986); *Sumner v. Mata*, 449 U.S.

539 (1981), 455 U.S. 591 (1982); *Rose v. Lundy*, 455 U.S. 509 (1982). The California Supreme Court has done just that, conscientiously and with the support of solid reasoning and long experience. It hardly comports with sound federalism to ignore their interpretation of state jury instructions and reverse their judgment on the basis of the competing interpretation advanced by the state with no support.

ARGUMENT

THE CALIFORNIA SUPREME COURT CORRECTLY CONCLUDED THAT THE INSTRUCTIONS AND THE PROSECUTOR'S ARGUMENT FORECLOSED JURY CONSIDERATION OF RESPONDENT'S MITIGATING EVIDENCE

A. Introduction

After respondent presented his mitigating evidence relating his unhappy and troubled upbringing and emotional disturbances, the jury was instructed upon how to reach their decision between life and death. They were given a list of factors, all relating to present or prior criminal activity, to consider:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (JA 21-23.)

The jury was then told how to reach their penalty decision.

"After having heard all of the evidence, an [sic] after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances *upon which you have been instructed.*" (JA 23; emphasis added.)

The jury was also expressly cautioned not to be influenced by sympathy.

"You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (JA 20.)

The prosecutor exploited these instructions in his argument to the jury, repeatedly telling them that the law forbade any consideration of sympathy and that respondent's mitigating evidence was entirely irrelevant to any of the factors they were to consider in reaching a penalty determination. (JA 85-96.) He told the jury that the defense witnesses and evidence were nothing more than "a blatant attempt" to inject sympathy into the case, but "[a]s the Judge will instruct you, you must not be swayed by sympathy." (JA 90-91.)

The California Supreme Court concluded that the anti-sympathy instruction combined with the restrictive standard list of factors to consider was "calculated to divert the jury from its constitutional duty to consider 'any [sympathetic] aspect of the defendant's character or record,' whether or not related to the offense for which he is on trial, in deciding the appropriate penalty." (*People v. Brown, supra*, 709 P.2d 440, 453.)

Contrary to the state's contention, this case does not present an issue of the propriety of untethered sympathy. At no stage of these proceedings has respondent argued that the jury may be influenced by untethered sympathy, and the California Supreme Court has expressly held that untethered sympathy is not a proper consideration.

The state does not dispute respondent's contention and the California Supreme Court's holding that respondent had a right to the benefit of the jury's sympathetic response to his mitigating evidence. The state's only dis-

pute with the California Supreme Court involves the interpretation of the jury instructions given. The state contends the instructions allowed consideration of respondent's mitigating evidence and precluded only the consideration of untethered sympathy, but the California Supreme Court has interpreted the instructions as denying respondent the benefit of his mitigating evidence. The state court's interpretation is based on its long experience with such instructions, and this Court should defer to that court on the point. (See *California v. Ramos*, 463 U.S. 992, 1010, fn. 24 (1983).²)

B. Respondent Was Entitled To The Jury's Sympathetic Consideration Of His Mitigating Background And Character Evidence

The state, respondent, and the California Supreme Court all agree that respondent was entitled to the jury's sympathetic consideration of his mitigating background and character evidence. Nevertheless, the jury was instructed:

"You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." (JA 20.)

The California Supreme Court held that this instruction frustrated respondent's right to have the jury react sympathetically to the mitigating evidence.

The state contends the instruction "means the trier of fact is not to decide the case based upon unfettered or

² In *Ramos* this Court had before it a California penalty phase instruction concerning the Governor's authority to commute a sentence. This Court found the wording of the instruction was ambiguous and deferred to the state Supreme Court's interpretation of the instruction.

untethered emotions unrelated to the facts and circumstances of the offense or the offender." (Petitioner's Brief, pp. 48-49.) However, that is not what the instruction says.³

Nothing in the instruction given the jury suggests untethered sympathy is inappropriate but sympathy in response to the mitigating evidence is acceptable. The instruction tells the jury not to consider sympathy, without any hint or suggestion that there are different types of sympathy, some which may be considered. Indeed, in grouping sympathy with conjecture, passion, and prejudice, which even most laypersons understand are inappropriate considerations, the instruction quite clearly conveys to the jury that sympathy is an unacceptable consideration and must be avoided.

The state's interpretation of the antisympathy instruction is unsupported either by the wording of the instruction or the California experience with it. The California Supreme Court has expressed agreement with the state's

³ In its petition for certiorari, the state stressed the word "mere" in the instruction, contending it told the jury to put aside only "mere" sympathy and suggesting it had no impact on sympathy rising above the level of mere. As respondent points out in the text, the instruction does not indicate there are different types of sympathy, some which may be considered and some which may not. There is, however, an additional problem with the argument that "mere" is significant.

The instruction tells the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." Read fairly, however, the "mere" modifies only sentiment and not sympathy and the other terms. If "mere" modified all the terms, the jury would be told not to consider, for example, "mere prejudice," implying prejudice itself was a proper consideration as long as it rose above the level of "mere prejudice." Such a reading, however, is absurd. The logical reading is that no prejudice, passion, or sympathy of *any* kind may be considered.

position that a jury may not base its verdict on factually untethered sympathy. (*People v. Lanphear*, 680 P.2d 1081, 1084, fn. 1 (1984); *People v. Easley*, 671 P.2d 813, 824 (1983).) That court, however, has specifically rejected the state's interpretation of the antisympathy instruction, noting that the instruction is not limited to factually untethered sympathy. (*People v. Easley*, *supra*, 671 P.2d at p. 824.) Rather, the court has considered the antisympathy instruction in the context of the California statutory scheme and other instructions given to the jury and concluded that the instructions operate "to divert the jury from its constitutional duty to consider 'any [sympathetic] aspect of the defendant's character or record.'" (*People v. Brown*, *supra*, 709 P.2d 440, 453.)

The state implies that allowing the jury to be influenced by sympathy would violate *Furman v. Georgia*, 408 U.S. 238 (1972), which held standardless sentencing power unconstitutional. The state, however, misunderstands not only the impact of the antisympathy instruction given here but also the very purpose of capital sentencing discretion.

In *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) this Court held that "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." The conscience of the community is expressed at a penalty trial when the jury considers the sympathetic response the defendant's mitigating evidence may stir and decides whether that calls for the exercise of mercy and compassion.

Historically, sympathy, compassion, and mercy have been considered indispensable to the jury's choice

between life and death. (*McGautha v. California*, 402 U.S. 183 (1971); *Andres v. United States*, 333 U.S. 740 (1948).) In *McGautha*, Justice Harlan traced the history of the use of sympathy and mercy in penalty determinations. He noted the "compassionate purposes of jury sentencing in capital cases" (402 U.S. at 221) and recognized that discretion was introduced into such sentencing as a mechanism for dispensing mercy. (See, generally, 402 U.S. at 197-208.)

The capital sentencing schemes upheld by this Court since *Furman* have varied in the degree of discretion given the jury. (Compare the absolute discretion once death eligibility is established in the Georgia statute reviewed in *Zant v. Stephens*, 462 U.S. 862 (1983) with the relatively limited discretion in answering three questions in the Texas statute reviewed in *Jurek v. Texas*, 428 U.S. 262 (1976).)⁴ This Court has consistently recognized, however, that a penalty jury is called upon to make a "highly subjective" determination (*Turner v. Murray*, 476 U.S. ___, 90 L.Ed.2d 27, 35 (1986)) requiring "substantial discretion" (*Caldwell v. Mississippi*, 472 U.S. ___, 86 L.Ed.2d 231, 242 (1985)) and has expressly noted that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." (*Gregg v. Georgia*, 428 U.S. 153, 199 (1976).)

Nothing in *Furman* precludes a penalty jury from considering their sympathetic response to the mitigating evidence in deciding whether to exercise mercy. This

⁴ The statute upheld in *Jurek* requires imposition of a death sentence if the jury finds beyond a reasonable doubt the answer to three questions is yes. Even under this fairly restrictive system, the jury retains a "wide range of judgment and discretion." (*Adams v. Texas*, 448 U.S. 38, 46 (1980).)

Court has upheld capital sentencing schemes which expressly allow for the consideration of sympathy and mercy. The statute upheld in *Jurek*, for example, had been construed by the Texas Court of Criminal Appeals as authorizing the exercise of mercy, which the court described as "one of the fundamental traditions of our system of criminal jurisprudence." (*Jurek v. State*, 522 S.W.2d 934, 940 (1975).) Similarly, the Georgia statute upheld in *Gregg* permitted the jury to make a binding recommendation of mercy even though it found no mitigating circumstances in the case. (428 U.S. at 197.)⁵

Commentators, too, have discussed the need for and propriety of jury consideration of sympathy and mercy in deciding between life and death for an individual. "[T]he real issue involved at the penalty trial is whether the jury will be sympathetic to the defendant and give him a life sentence, or will be morally outraged at the defendant and condemn him to death . . ." (Comment, *The Death Penalty Cases*, 56 Cal.L.Rev. 1268, 1410 (1968).) Thus, the goal of defense counsel is usually to persuade the jury to look with sympathy on the defendant. (See, generally, Balske, *New Strategies for the Defense of Capital Cases*, 13 Akron L.Rev. 331 (1979).)

The Attorney General does not suggest that an instruction which had the effect of denying respondent the benefit of the jury's sympathetic response to the mitigating evidence would be constitutional; he merely disagrees with the California Supreme Court interpretation of the

⁵ Most recently this Court recognized the propriety of the consideration of mercy in the penalty determination in *Darden v. Wainwright*, 477 U.S. —, 91 L.Ed.2d 144 (1986) which held counsel did not render ineffective assistance at the penalty trial when he chose to rely on a plea for mercy.

instruction and stakes his entire argument on the proposition that the antisympathy instruction means what he says it means rather than what the state court has found it means.

In resolving the dispute about the meaning of the instruction, this Court should keep in mind that the California Supreme Court has addressed the ultimate effect and historical context of the instruction and "careful consideration [should be given] its views because they concern the purpose, scope, and operative effect of a provision of . . . California [law]." (*Reitman v. Mulkey*, 387 U.S. 369, 374 (1967).)

The California Supreme Court has had much experience with antisympathy instructions, both before and after *Furman*. (See, e.g., *People v. Polk*, 406 P.2d 641 (1965); *People v. Vaughn*, 455 P.2d 122 (1969); *People v. Bandhauer*, 463 P.2d 408 (1970); *People v. Easley*, *supra*, 671 P.2d 813; *People v. Lanphear*, *supra*, 680 P.2d 1081.) It has seen many records containing not only various forms of such instructions but also the arguments of prosecutors built upon the anticipation of an antisympathy instruction. It is the state court which is in the best position to assess the likely significance to a juror of an antisympathy instruction in the context of the state capital sentencing scheme and the attendant standard jury instructions.

It is noteworthy to consider the prosecutor's actions and argument in this case. During voir dire the prosecutor made a point of having virtually all the jurors promise they would put aside personal feelings, including feelings of sympathy, in reaching a penalty determination. (See, e.g., JA 30-34.) Then in argument to the jury at the penalty phase, the prosecutor reminded the jurors of their promises during voir dire (JA 85-87) and repeatedly

told them that they would be instructed by the judge to put aside sympathy and they must do so. (JA 87, 89, 91-93, 95-96). He did not differentiate between untethered sympathy and sympathy tied to the evidence; quite the contrary, he expressly told the jury that the defense witnesses and evidence were nothing more than "a blatant attempt" to inject sympathy into the case, but "[a]s the Judge will instruct you, you must not be swayed by sympathy." (JA 90-91.)

Sympathy here would not be an irrational impulse unrelated to the facts of the case. On the contrary, it would be a legitimate response to those facts, arising from them and providing the context within which a moral assessment of the evidence and a determination of whether mercy is called for can be made.⁶

This case is not the first the California Supreme Court has seen in which the prosecutor sought to divert the jury's attention away from the mitigating evidence by arguing that sympathy and mercy were inappropriate considerations. In *People v. Robertson*, 655 P.2d 279, 300 (1982), "the prosecutor repeatedly told the jurors that it would be improper for them to consider defendant's 'fam-

⁶ Relying on the dissenting views of California Supreme Court Justice Mosk, the Attorney General contends that an antisympathy instruction really benefits a capital defendant in that it prevents a verdict based on sympathy for the victim. (Petitioner's Brief, pp. 59-62.) If the antisympathy instruction were limited to precluding consideration of sympathy for the victim, perhaps a defendant would benefit; but an unlimited antisympathy instruction, such as was given here, results in precluding full consideration of the defendant's mitigating evidence and can only harm a defendant's case for life. The answer lies in carefully drawn and limited instructions telling the jury they can consider their sympathetic response to the mitigating evidence.

ily history' or to permit their sympathy for him to affect their penalty determination." Similarly, in *People v. Easley*, *supra*, 671 P.2d 813, 826, fn. 11, the prosecutor told the jury that sympathy was not a mitigating factor they could consider and that they were restricted to considering the factors upon which they were instructed.⁷

This is the type of experience the California Supreme Court has had with antisympathy instructions and arguments. It is an experience which fully supports the court's holding in this case that the instruction operated to divert the jury from its duty to consider the mitigating evidence and clearly refutes the unsupported interpretation offered by the state that the instruction precludes the consideration of only untethered sympathy.

C. The Other Penalty Instructions Relied Upon By The State Did Not Correct The Problems Created By The Antisympathy Instruction

In arguing that the antisympathy instruction did not withdraw consideration of respondent's mitigating evi-

⁷ See Appendix A for other examples of prosecutors' arguments relative to sympathy in cases pending before the California Supreme Court.

Prosecutors are not the only ones who interpret an antisympathy instruction as meaning a defendant's background and character evidence are irrelevant to the penalty determination. Antisympathy instructions are sanctioned in Illinois. In *People v. Wright*, 490 N.E.2d 640 (1985), the defendant presented evidence of his troubled youth and mental illness. The trial judge, acting as sentencer, found that the evidence established there were sympathetic aspects to the defendant's character but held that he could not, by law, consider that and the defendant was sentenced to death. (See *Wright v. Illinois*, cert. pending in 85-6783.)

If prosecutors and judges, schooled in the law and constitutional principles, interpret antisympathy instructions as precluding consideration of a defendant's background and character evidence, it is quite likely that reasonable jurors do so also.

dence, the state repeatedly contends that the instructions given advised the jury to consider all evidence relating to the offense and the offender. (Petitioner's Brief, pp. 25, 26, 49, 53, 57-58.) The instructions were more limited than the state suggests, however.

In addition to telling the jury not to be swayed by sympathy, the instructions provided a list of factors the jury was to consider in determining penalty. (JA 21-23.) The jury was then told to reach their decision by considering the factors "upon which you have been instructed." (JA 23.)

Thus, the jury was told to restrict their consideration to the factors on the list they were given.⁸ Those factors, however, deal exclusively with present and prior criminal activity and do not mention background or character evidence.

Factor (k) tells the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The state contends this factor includes a consideration of background and character evidence. As with his interpretation of the antisympathy instruction, the Attorney General's interpretation of factor (k) is totally unsupported and entirely inconsistent with the California Supreme Court's interpretation.

⁸ The California Supreme Court has determined that the instruction advising the jury to consider the factors upon which they have been instructed "makes clear" that consideration is limited to the specific factors listed. (*People v. Brown*, *supra*, 709 P.2d 440, 458; *People v. Boyd*, 700 P.2d 782, 790 (1985).) The Attorney General does not dispute this point; rather, his contention is that the factors listed include consideration of background and character evidence.

The California Supreme Court has held that the language of factor (k) is potentially confusing and may well preclude the jury from considering a defendant's background and character evidence. Thus, the court in 1983 ordered that factor (k) should be expanded to provide consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death." (*People v. Easley*, *supra*, 671 P.2d 813, 826 fn. 10.)⁹ Respondent, however, did not have the benefit of this expansion since his trial took place in 1982.

Factor (k), as given to respondent's jury, told them to consider "[a]ny other circumstance which extenuates the gravity of the crime." By its very wording, factor (k) is limited to a consideration of evidence bearing directly on the crime. Background and character evidence does not, as a general rule, bear on the crime; rather, it is the evidence a defendant proffers as the reason for a sentence less than death *in spite of* his unmitigated crime.

The best that can be said of the instruction is that it is ambiguous relative to the propriety of considering background and character evidence, but "*Woodson and Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the [sentencer]." (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 119 [O'Connor, J., concurring].) Because a reasonable juror could have interpreted the instruction as precluding consideration of respondent's mitigating back-

⁹ Subsequent to the *Easley* opinion, the Committee on California Jury Instructions, Criminal, modified the standard jury instruction to incorporate the *Easley* expansion. (CALJIC No. 8.84.1.)

ground and character evidence, the instruction could not have cured the problem created by the antisympathy instruction in suggesting respondent's mitigating evidence was irrelevant. (See *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979).)

The likelihood that the jury read the instructions as foreclosing consideration of respondent's background and character evidence is heightened by the prosecutor's argument. The prosecutor clearly read factor (k) as limited to evidence which directly mitigated the crime. The prosecutor told the jury:

"Finally, ladies and gentlemen, there is the factor of other circumstances which extenuate the gravity of the crime, even though not a legal excuse; if present, it might mitigate, if absent there is no mitigation.

"There is no evidence, ladies and gentlemen, I would suggest to you, which extenuates the gravity of this crime, the killing of Susan Jordan that has been presented. No explanation, no remorse . . .

"[The defense] brought to you in two days a parade of relatives who admitted that they were biased witnesses in the case, who told us a lot about the defendant from their point of view. They told us what a good boy he was at the time in his youth when they knew him. And he brought them gifts and that he cared after his siblings. *They did not testify, ladies and gentlemen, regarding any of the factors which relate to your decision in this case.*" (JA 89-90; emphasis added.)

Thus, the prosecutor read factor (k) as restricted to the crime and rendering respondent's mitigating evidence entirely irrelevant. Certainly a reasonable juror could have read the instruction the same restrictive way and

indeed probably did after listening to the prosecutor's argument.¹⁰

As with its interpretation of the antisympathy instruction, the California Supreme Court's interpretation of factor (k) as too restrictive to cure the impression given by the antisympathy instruction comes from its experience of reviewing the records of capital trials. The court has seen how prosecutors and trial judges interpret the instruction. The prosecutor's argument in this case is not unusual. In *People v. Davenport*, 710 P.2d 861, 883 (1983), for example, the prosecutor argued to the jury that evidence of the defendant's background could be considered a mitigating circumstance only if it had some relationship to the crime of which he was convicted. Similarly, in *People v. Robertson*, *supra*, 665 P.2d 279, 300, the prosecutor told the jury they could consider only the crime and the defendant at the time of the crime; he advised the jury that other factors, such as the evidence showing the defendant "didn't get the breaks in life," were irrelevant to their decision.¹¹

¹⁰ Even if the factor (k) instruction adequately advised the jury of its duty to consider the mitigating evidence, it then contradicted the antisympathy instruction and error still occurred. A reasonable juror could easily have resolved the contradiction by choosing to rely on the specific antisympathy instruction and ignoring the general instruction. "Nothing in [the] specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin*, 471 U.S. —, 85 L.Ed.2d 344, 358 (1985).)

¹¹ See Appendix B for other examples of cases pending before the California Supreme Court in which prosecutors argued or judges stated that factor (k) was restricted to circumstances bearing directly on the crime.

Far from correcting the impression the antisympathy instruction and argument left the jury, the other penalty instructions reinforced the idea that respondent's mitigating evidence of his troubled upbringing and emotional disturbances was irrelevant to the penalty determination. Thus, it is probable the jury reached their determination that respondent should suffer death without ever having considered his mitigating evidence.¹²

Contrary to the state's contention (Petitioner's Brief, pp. 55-57), this Court has never upheld the California penalty instructions as consistent with *Lockett* principles. In *Pulley v. Harris*, 465 U.S. 37 (1984), this Court upheld the absence of a provision requiring proportionality review in the California statute in use at that time and noted the statute was constitutional "on its face." (*Id.*, at 53.) *Harris* does not consider or discuss jury instructions,

¹² The prosecutor's argument here also violated respondent's right to due process. In *Gardner v. Florida*, 430 U.S. 349 (1977), this Court concluded that the defendant was denied due process because the death penalty was imposed in part of the basis of information he had no opportunity to explain or deny. More recently, in *Skipper v. South Carolina*, *supra*, 90 L.Ed.2d 1, the Court found a due process violation when the defendant was not allowed to introduce evidence of his good behavior in custody to answer the prosecutor's argument that he would be a danger in prison.

In this case, the prosecutor told the jury respondent's mitigating evidence was irrelevant to the penalty determination. The instructions gave respondent no opportunity to correct that inaccurate argument; to the contrary, the instructions supported the prosecutor's contentions. Thus, to the extent respondent's mitigating evidence helped explain the aggravating evidence, he was denied due process because the instructions and the prosecutor's argument denied him the benefit of his evidence, and the result was he was not given a meaningful opportunity to explain or mitigate the case for death.

their meaning, or their impact on the jury's consideration of the mitigating evidence. In *California v. Ramos*, *supra*, 463 U.S. 992, the Court noted that the California scheme is consistent with *Lockett* in that it allows the defendant to present any mitigating evidence he has. (*Id.*, at 1005, fn. 19.) The right to present evidence is very different than the right to have that evidence considered.¹³ Respondent concedes he was allowed to present his mitigating evidence without limitation; he contends, however, that the jury instructions foreclosed *consideration* of that evidence. Neither *Harris* nor *Ramos* considered or discussed this issue.

Instructions are important to the jury's determination of the case. "It is quite simply, a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia*, *supra*, 428 U.S. 153, 193.) "The charge [to the jury] is that part of the whole trial which probably exercises the weightiest influence upon the jurors." (*Andres v. United States*, *supra*, 333 U.S. 740, 765 [Frankfurter, J., concurring].)

The Court presumes that jurors "conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin*, *supra*, 85 L.Ed.2d 344, 359-360, fn. 9.) A determination of what a particular

¹³ *Eddings v. Oklahoma*, *supra*, 455 U.S. 194 recognizes the critical difference between presenting evidence and having the sentencer consider that evidence. The Oklahoma statute allowed Eddings to present evidence "as to any mitigating circumstances" (*id.*, at 115, fn. 10) and he did present evidence of his troubled youth and emotional disturbances. (*Id.*, at 107-108.) Eddings' death judgment was vacated because the sentencer did not consider the evidence Eddings was able to present.

instruction means and whether it accorded the defendant his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. (*Sandstrom v. Montana*, *supra*, 442 U.S. 510, 514.)

Instructions at the penalty phase of a capital case take on an even greater significance. In *Lockett v. Ohio*, *supra*, 438 U.S. 586, 605, this Court noted the importance of minimizing "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." It is this concern that compels a close examination of penalty instructions. Ambiguous instructions are simply not good enough. As Justice O'Connor has noted: "[W]e may not speculate as to whether the [sentencer] actually considered all of the mitigating factors . . . *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered . . ." (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 119 [O'Connor, J., concurring].)

When evaluated with these principles in mind, the instructions in this case fall far short of the constitutional imperative requiring jurors be advised to consider any mitigating evidence proffered by the defendant "as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. 586, 604.)

CONCLUSION

The issue here is a narrow one. All parties agree that respondent had a right to the jury's consideration of their sympathetic response to his mitigating background and character evidence. The only question is whether the California Supreme Court reasonably concluded that the antisympathy instruction together with the other restrictive instructions compromised that right. The state's interpretation of the instructions is entirely unsupported;

the California Supreme Court's interpretation is backed by the wording of the instructions and long experience with it.

The most important function the jury at a capital sentencing trial has is as the "link between contemporary community values and the penal system." (*Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 520, fn. 15.) Contemporary community values require that justice be tempered with mercy. Quoting Arthur Koestler, this Court has noted: "The test of one's humanity is whether one is able to accept this fact—not as lip service, but with the shuddering recognition of a kinship: here but for the grace of God, drop I." (*Id.*, at 520, fn. 17.)

It is, accordingly, the precise function of the jury at the penalty phase of a capital case to examine mitigating evidence as it appeals to their sympathies and determine whether to be compassionate and merciful. To instruct the jury that they may not consider their sympathetic response to the defendant's mitigating evidence is to tell the jury not to engage in the very task they have been empaneled to perform.

Respondent literally staked his life on the hope that his jury would consider his mitigating background and character evidence, would view the evidence sympathetically, and would decide to exercise mercy. However, the prosecutor's argument, the antisympathy instruction, and the other instructions restricting the jury's consideration to facts directly bearing on the crime withdrew respondent's evidence from the jury's consideration. "[I]t was as if the trial judge had instructed [the] jury to disregard the mitigating evidence [respondent] proffered on his behalf. The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they

may not give it no weight by excluding such evidence from their consideration." (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 114.)

As the California Supreme Court held, "the ambiguous tension between [the] instructions and defendant's right to sympathetic consideration of all the character and background evidence he presented requires reversal of the penalty judgment." (*People v. Brown*, *supra*, 709 P.2d 440, 453.) The decision below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

EXCERPT FROM *PEOPLE v. ROBERTSON*, CRIM. 20577,
 DECIDED BY THE CALIFORNIA SUPREME COURT IN 1982
 (665 P.2d 279)

From the prosecutor's closing argument to the jury:

"Secondly, irrelevant information in this case would be a prejudice or a passion or sympathy. This is where you will have a great deal of difficulty. You, right now, are going to be wearing, so to speak, the black robes of a judge. You are responsible for listening to the facts of this case. Ignore your own personal opinions of sympathy and prejudice and passion. It's necessary for you to do that to base it upon the facts, to have a reason for what you're doing, and to ignore sympathy, because sympathy is unreasoned." (1 ART 1046.)

* * * * *

"Again, I will emphasize very strongly that these factors are based on facts, the testimony. Not sympathy, not Dr. Hunt's: He should get off because he didn't get the breaks in life. . . . That's a sympathy factor, a sympathy factor that does not focus on the real issue, the crime and the person Andrew Robertson was at the time the crime was committed." (1 ART 1067.)

* * * * *

"He [defense counsel], first of all, went to the person of Andrew Robertson, giving Andrew Robertson's history, where he was born, how old he was, what he did as a young man, the fact that he went into the service. That is not a factor. That is irrelevant to your decision in this case. You must decide whether or not this crime is of the death penalty type and you must consider the actor in the crime, Andrew Robertson, as he appeared during the course of the crime, not as he appeared when he was four years old or nine years old. The fact that he did or didn't like vegetables when he was nine years old plays no part in your decision.

"The reason for that is that you are asked to focus on the crime itself, what penalty is to be invoked for this type of crime." (1 ART 1099-1100.)

**EXCERPT FROM *PEOPLE v. GATES*, CRIM. 22263,
PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA
SUPREME COURT**

From the prosecutor's closing argument to the jury:

"It's not a time to talk for mercy or forgiveness for Oscar Gates. It's too late for that. All throughout voir dire we talked about would you follow the law, would you base your decision on evidence received in the court, not religion, not mercy, forgiveness, philosophy, anything you personally might believe or feel, not feelings of guilt in your part or sorrow for his family.

"The evidence that you received in the case, that's what you promised the judge you'd base your decision on, because the time now is not for philosophy or religion, mercy, forgiveness, sorry for the family, feelings of guilt on your own part. The time now is, I would say, a time for justice for Oscar Gates. Now is the time for an accounting finally." (RT 1286-1287.)

**EXCERPT FROM *PEOPLE v. WALKER*, CRIM. 21707,
PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA
SUPREME COURT**

From the prosecutor's closing argument to the jury:

"I also mentioned, and I guess I should mention it now—I wasn't going to—the fact that there had been things here which could elicit sympathy. Things which had nothing to do with the case. Mr. Walker belongs to a large family, and those members have been present here for the jury's observations during the case. But again, obviously that has nothing to do with this case." (RT 3298.)

**EXCERPT FROM *PEOPLE v. BOYDE*, CRIM. 22584,
PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA
SUPREME COURT**

From the prosecutor's closing argument to the jury:

"The process of weighing, I think, is a rational process, it is a process of being able to go through each factor, decide whether or not it aggravates or mitigates, and

consider that factor in relation to the other factors that you'll hear, and come to a rational decision. It is not a question, I believe, that should be guided by emotion, sympathy, pity, anger, hate, or anything like that because it is not rational if you make a decision on that kind of basis." (RT 4767.)

* * * * *

"Secondly, the argument is a question of sympathy, sympathy is an interesting thing, because even though you try not to consider it, this decision you are going to make has emotional overtones to it. It would be very hard to completely filter out all our emotions, make the decision on a rational basis. Although the instruction says you are to try to do that." (RT 4817.)

APPENDIX B

EXCERPT FROM *PEOPLE v. PAYTON*, CRIM. 22511,
PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA
SUPREME COURT

From the prosecutor's argument to the jury:

"K says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact—okay?—some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did.

"It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new-born Christianity. (RT 2121-2122.)

"Referring back to 'K' which I was talking about, any other circumstances which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.

"The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.

"[Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when—under any other circumstance which extenuates or lessens the gravity of the crime, refers—seems to refer to a fact in operation at the time of the offense.

"What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all.

"You have not heard any evidence of mitigation in this trial." (RT 2125.)

From the court's ruling on defendant's motion to modify the death verdict:

"Last, subsection K, the court should consider any other circumstance which extenuates the gravity of the crime, even though not a legal excuse. I'm aware that the People's position of the defendant's religious activity being subsequent to the offense was not relevant.

"The court disagreed and allowed the jury to hear all the area regarding the defendant's religious rehabilitation and positive influence on other inmates. That defense was presented, the defendant's born again Christianity, and other conduct in prison.

"As far as the court was concerned, I felt that was a proper mitigating factor to go to the trier of fact. And it was allowed.

"There was also evidence of the talents the defendant possessed, such as writing. And all this was presented for the positive effect of sparing the defendant's life, and submitted to the trier.

"Again, this testimony and the inference to be drawn there, they were presented to the trier of fact in the penalty phase. And in this court's opinion, it was a mitigating factor.

"However, none of these witnesses Mr. Payton called could offer any explanation or any circumstance that would extenuate the gravity of the crime, or give any evidence which morally justified or extenuated the defendant's conduct in the court's position—or opinion." (16 RT 25-26.)

EXCERPT FROM *PEOPLE v. HAMILTON*, CRIM. 22311,
PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA
SUPREME COURT

From the prosecutor's argument to the jury:

"Number eleven, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. Is there any justification or excuse offered on behalf of the defendant for why this crime

occurred? Obviously there is not. The evidence presented by the defendant this morning goes not to any of these eleven guidelines. What you heard this morning was evidence from people who knew the defendant well twelve years ago. None of these people knew the defendant or were with the defendant at or about the time these crimes were occurring.

"In listening to those guidelines the court has read to you, there are no circumstances in mitigation. What was presented to you this morning does not apply to any of the guidelines the court is going to read to you. . . . That's what makes your decision easy in this case is that there are no circumstances in mitigation." (19B RT 13-14.)

From the court's ruling on defendant's motion to modify the death verdict:

"I have carefully reviewed all the mitigating and aggravating circumstances set forth in 190.3 and I find that without exception all the aggravating circumstances are applicable and except for those that by their very nature have no application at all to this case, and that there is in fact from this record and what's before me, no mitigating circumstances. . . . I do not find an unhappy childhood, which certainly was the case, to be any justification or mitigating circumstance." (22 RT 13-14.)

**EXCERPT FROM *PEOPLE v. BIGELOW*, CRIM. 22018,
DECIDED BY THE CALIFORNIA SUPREME COURT IN 1974
(691 P.2d 994)**

From the court's ruling on defendant's motion to modify the death verdict:

"THE COURT: Now we have a catchall K, which is any other circumstances which extenuates the gravity of the crime, even though it is not a legal excuse for the crime.

"Do you have anything you want to tell me under that factor, Mr. Bigelow?"

"THE DEFENDANT: Extenuates the gravity of the crime, well, that's—would my sisters and brothers, would their testimony fall into that, my childhood, and not being

raised with proper parents, and—would that fall into extenuation of the gravity?

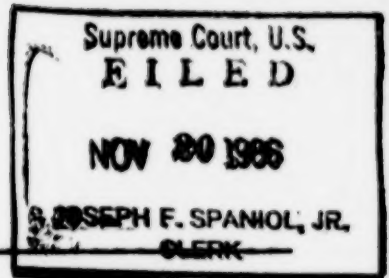
"THE COURT: No, I don't think that would. I don't see how your childhood, because you've evidently had a not too happy childhood, but that doesn't give you the right to come to America and take an innocent man and kill him. Does it?" (5/8/81 RT 28.)

**EXCERPT FROM *PEOPLE v. WALKER*, CRIM. 21707,
PENDING ON AUTOMATIC APPEAL IN THE CALIFORNIA
SUPREME COURT**

From the prosecutor's closing argument to the jury:

"The last one, any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime. You will interpret that. I think the language of this, although I'm not sure extenuates is a good, very good word there, but the language of it, I assume, is meant to say that: Is there something that makes this less serious? Makes this crime less serious than it looks when you look at the other factors in the case? Although it's not a legal excuse, again, it would be something in a theoretical case where somebody felt that the person who he killed was someone who meant harm to his family, someone who had threatened him, someone who had made life miserable. That's not legal excuse, but you couldn't do that, but it might very well be a jury could find in some way that lessened the gravity of the crime. This case, again, is exactly the opposite. You have innocent citizens. You have robberies. I'm sure you've all read about them once in awhile where things get wild, someone tries to go for a gun himself and the robber shoots, or a gun goes off or something happens and there's a tragedy and a person's life is taken, and certainly that person is guilty of what Mr. Walker is guilty of in this case. This isn't anything like this case. Exactly the opposite." (RT 3279-3280.)

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No. 85-1563



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

REPLY BRIEF

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PETITION FOR CERTIORARI FILED MARCH 22, 1986

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No. 85-1563

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Respondent.

REPLY BRIEF

ARGUMENT

I

THIS CASE CLEARLY PRESENTS A
FEDERAL QUESTION

Initially, Amicus curiae in support of respondent Brown argues, and respondent Brown suggests, the California Supreme Court decided the issue regarding the giving of an instruction advising the jury not to be swayed

by mere sympathy on independent state grounds and this Court thus should not review the decision. (Amicus Brief, p. 9; RB 10, fn 2.)

This argument is made although the Chief Justice in his order staying enforcement of the judgment expressly found a federal question was presented. (See California v. Brown (1986) ___ U.S. ___ [89 L.Ed.2d 702].) Moreover, the California Supreme Court expressly found the giving of the instruction in this case violated federal constitutional law. (People v. Brown (1985) 40 Cal.3d 512, 53.) Since the California Supreme Court expressly concluded the giving of the instruction violated the federal Constitution, this issue certainly presents a federal question for this Court to review. (See generally, Michigan v. Long (1983) 463 U.S. 1032, 1039-1043.)

Even assuming arguendo this Court concludes the case was not fully decided under principles of federal constitutional law, it certainly was decided primarily on federal constitutional law or was interwoven with federal constitutional law. Under these circumstances this Court still has the authority to review the decision of the California Supreme Court. (Michigan v. Long, supra, at pp. 1040-1041.)

II

AN INSTRUCTION ADVISING THE JURY NOT TO BE SWAYED BY MERE SYMPATHY DOES NOT VIOLATE THE UNITED STATES CONSTITUTION BECAUSE THE FEDERAL CONSTITUTION DOES NOT REQUIRE THE JURY CONSIDER MERE SYMPATHY WHEN DETERMINING WHETHER TO IMPOSE THE DEATH PENALTY

Respondent argues he was entitled to have the jury's consideration of his mitigating background and character evidence, but the instruction advising the jury not to be swayed by

sympathy precluded such consideration.

(RB 10.) This argument is incorrect.

A. Petitioner's Position

At the outset it must be noted respondent Brown misunderstands the position of petitioner, the State of California, in this case. He argues the jury should be permitted to consider sympathy in determining the appropriate punishment. He further asserts that the only difference between the position of petitioner and respondent is that petitioner, the State of California, believes the sympathy must be related to the offense and the offender, i.e., tethered to the facts of the case. His entire brief then flows from this faulty premise.

The State of California takes the position the instruction advising the jury not to be swayed by mere sympathy is consistent with the federal Constitution.

This is so because the instruction does not preclude the jury from considering valid mitigating factors, but advises the jury not to be swayed by simple emotions such as sentiment, sympathy, public opinion, prejudice, etc. Nothing in the United States Constitution requires a jury to consider such emotional factors in determining whether death is the appropriate punishment. (See Rehnquist, J. dissenting, Caldwell v. Mississippi (1985) ___ U.S. ___ [86 L.Ed.2d 231, 252].)

Lockett v. Ohio (1978) 438 U.S. 586 and Eddings v. Oklahoma (1982) 455 U.S. 104, require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any circumstance of the offense that the

defendant proffers as a basis for a sentence less than death.

Sympathy, however, is not a factor that relates to the offense or the offender, but is an emotion of the jury that really has no place in the sentencing process. (See Mosk, J. dissenting, in People v. Lanphear (1984) 36 Cal.3d at pp. 163, 170.) Indeed, the American Civil Liberties Union in support of Brown agrees sympathy is not a mitigating factor, but an emotion (Amicus Brief, p. 15). (But see, Gardner v. Florida (1977) 430 U.S. 349, 358 [emotion has no place in the decision to impose death].)

Thus, the State of California could properly and consistently with the United States Constitution have the jury instructed not to be swayed merely by

sympathy in determining whether to impose the death penalty.

The problem with letting the jury be "swayed" by sympathy is that it is all too often a two edged sword. If the jury can be swayed by sympathy, it can also be swayed by a lack of sympathy for the offender because he is not good looking, does not speak well, or is of the wrong racial, ethnic or religious persuasion. Thus, telling a jury to be swayed by sympathy or raw emotion is more than likely to work against the defendant in a capital case than for the defendant. In addition, blind sympathy could be engendered for the victims as well as for the defendant. (See Mosk, J. dissenting, People v. Lanphear, supra, 36 Cal.3d at P. 170.)

Consequently, the instruction correctly, and in accord with the federal

Constitution, advises the jury not to be swayed by sympathy or other emotions such as passion, prejudice, public opinion, or public feeling. The jury is to analyze the facts of the case and the circumstances relating to the offender.

B. Decisions of This Court

Respondent cites to various cases of this Court which he claims indicate the jury is to consider sympathy and mercy. These cases include Witherspoon v. Illinois (1968) 391 U.S. 510, 519; McGautha v. California (1971) 402 U.S. 183; and Andres v. United States (1948) 333 U.S. 740. However, these cases were decided before Furman v. Georgia, supra, 408 U.S. 28 and Gregg v. Georgia (1976) 428 U.S. 153 which indicated a jury was not to have unlimited discretion in determining the appropriate penalty.

Respondent further cites to cases such as Zant v. Stephens (1983) 462 U.S. 862, 900; Caldwell v. Mississippi (1985) ____ U.S. ____ [86 L.Ed.2d 231]; and Turner v. Murray (1986) ____ U.S. ____ [90 L.Ed.2d 27, 35], for the proposition the jury had discretion to determine the appropriate penalty and this is a subjective decision.

Petitioner agrees with the proposition that a jury has some discretion in determining the penalty. However, as this Court has noted in Turner v. Murray, supra, the capital sentencer is to weigh "relevant mitigating evidence before deciding whether to impose the death penalty. . . ." (Turner v. Murray, supra, 90 L.Ed.2d at p. 35.) Yet, since sympathy is not a relevant mitigating factor upon which a jury is to base its discretion, the state may preclude the

jury from considering sympathy in determining whether to impose the death penalty.

Furthermore, while the final decision of the trier of fact can be merciful or a sympathetic response to relevant evidence, the state may properly decide a jury should not make its decision based upon mere sympathy or mercy which are not relevant mitigating factors.

C. Interpretation of the
Instruction by the
California Supreme Court

Respondent further argues that the State of California has simply chosen to interpret the instruction differently than the California Supreme Court and the interpretation of the instruction by that court should be followed.

However, the issue here is not one of statutory construction of a factual

finding, but whether the instruction by telling the jury not to be swayed by mere sympathy precluded the jury from considering a valid mitigating factor under the federal Constitution. This is a matter for this Court to ultimately determine. (See e.g., Sandstrom v. Montana (1979) 442 U.S. 510, 516.)

Moreover, the decisions of the California Supreme Court regarding this instruction are hardly persuasive. People v. Polk (1965) 63 Cal.2d 443; People v. Bandhauer (1970) 1 Cal.3d 609 and People v. Vaughn (1969) 71 Cal.2d 406, 422, were decided when California law gave the jury absolute discretion in determining the penalty. (People v. Friend (1957) 47 Cal.2d 749, 765-768.) Such standardless sentencing schemes were declared unconstitutional in Furman.

Cases such as People v. Easley (1983) 34 Cal.3d 858, 876 and People v. Lanphear (1984) 36 Cal.3d 136, which were decided after Furman and Gregg also are of little assistance since this Court has granted certiorari to examine whether the California Supreme Court has correctly concluded the giving of the no-sympathy instruction violates the federal Constitution.

Indeed, this case is remarkably similar to California v. Ramos (1983) 463 U.S. 992. There the jury was instructed regarding the governor's power to commute a sentence of life without possibility of parole. The California Supreme Court examined the instruction and concluded the effect of the instruction was to

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deflect the jury from considering the offense and the offender and instead focused the jury onto matters that had no place in a capital sentencing determination. (Id., at p. 996.)

This Court then examined the same instruction and concluded it did not have an unconstitutional affect on the jury, but let it consider relevant matters. (California v. Ramos, supra, 463 U.S. at pp. 1001-1005.)

In Ramos, this Court concluded it had the authority to evaluate the impact of an instruction on jurors and to determine whether the instruction unconstitutionally affected the jury's determination of the appropriate penalty.

This is precisely the same function that it to occur here. This Court is again being asked to determine

whether an instruction results in a decision to impose the death penalty that cannot pass constitutional muster.

Consequently, this Court need not defer to the California Supreme Court to determine the affect of CALJIC No. 8.84 on the penalty determination. (Sandstrom v. Montana, supra, 442 U.S. at p. 516.)

D. Arguments of Counsel

Both respondent and amicus for respondent, the American Civil Liberties Union, intersperse their briefs with comments about the argument made by the prosecutor in this case and arguments made by prosecutors in other cases. (See RB appendix.)

However, discussion of these arguments is misleading as they have nothing to do with this case. When this Court granted certiorari in this case the

order specified that certiorari was granted limited to Question 1 presented by the petition. Question 1 of the petition was limited solely to the constitutionality of the instruction at issue here (54 USLW 3793.)

The issue thus is whether the instruction as given here is constitutional on its face and not whether various types of argument made by prosecutors concerning sympathy are proper.

In any event, it should be noted the prosecutor simply advised the jury consistent with the instruction to decide the case on the law and not be swayed by sympathy for or against the defendant, his family, or the victim's family. (JA 92-94.)

E. CALJIC No 8.84.1 Allows the Jury to Consider All Relevant Mitigating Factors

Respondent also takes issue with the position of the State of

California that the giving of CALJIC No. 8.84.1 permitted the jury to consider all relevant mitigating factors.

Respondent also notes the California Supreme Court has observed the instruction may well preclude the jury from considering a defendant's background and character evidence. (People v. Easley, supra, 34 Cal.3d at p. 858.) Respondent Brown then argues the interpretation of the instruction by the California Supreme Court should be followed. (RB 19-22.)

There are several answers to this suggestion. First, the court was not interpreting a statute under state law or making a factual finding. Rather, the court was explaining what effect the instruction would have upon a jury and whether this instruction would thereby violate the United States Constitution. However, this is a matter for this Court

to determine. (Sandstrom v. Montana,
supra, 442 U.S. 510, 56.)

Furthermore, this Court has already essentially held the language of CALJIC No 8.84.1(k) is consistent with federal constitutional law and the decision of this Court certainly is controlling over the decision of the California Supreme Court.

CALJIC No. 8.84.1 contains the same language as Penal Code section 190.3 which sets out the aggravating and mitigating factors the jury is to consider at the penalty phase.

In California v. Ramos, supra, 463 U.S. at p. 1105, fn. 19, this Court expressly held Penal Code section 190.3 permits the defendant to present any evidence to show that the penalty less than death is appropriate and met the requirements of Lockett v. Ohio, supra, 438 U.S.

586. If Penal Code section 190.3, subdivision (k) meets the standards set in Lockett, supra, the same language in CALJIC No. 8.84.1 also must meet these standards. (See too, Pulley v. Harris (1984) 465 U.S. 37, 53 [1977 California death penalty law with similar provisions held constitutional].)

In addition, a reading of the language of CALJIC No. 8.84.1(k) compels rejection of the position of the California Supreme Court as subdivision (k), like the other provisions of CALJIC No. 8.84.1, does not limit the jury to a consideration of mitigating factors only relating to the offense, but allows consideration of mitigating factors relating to the offender as well. (Petitioner's Brief, pp. 54-58.)

Accordingly, because the giving of CALJIC No. 8.84.1 permitted the jury

to consider any mitigating evidence relating to the offense and the offender, and the instruction advising the jury not to be swayed by mere sympathy, merely advised the jury not to decide the case based upon irrelevant emotions, but on the facts of the case and matters relating to the offender, the giving of that instruction did not violate the federal Constitution.

This was consistent with the decision of this Court in Gardner v. Florida (1977) 430 U.S. 349, 358, that

"[I]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Emphasis added.)

* * * * *

CONCLUSION

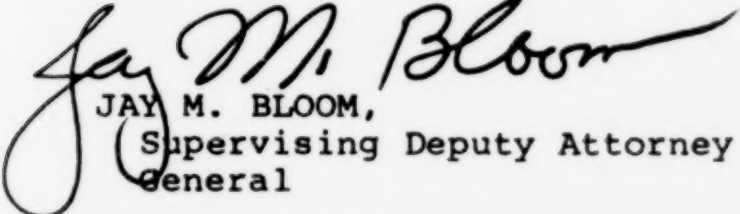
For all the foregoing reasons
Petitioner State of California respectfully requests the judgment of the California Supreme Court be reversed insofar as it reverses the penalty of death and that the cause be remanded to that Court for further proceedings.

Respectfully submitted,

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PEOPLE OF THE STATE OF
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Petitioner,
v.

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ALBERT GREENWOOD BROWN

Respondent

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY BRIEF as follows: To Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 19 day of November, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 19, 1986.

Subscribed and sworn to before me
this 19th day of November 1986.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Vida M. Allen

Notary Public in and for said County and State



VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO

My commission expires Aug. 20, 1990

BEST AVAILABLE COPY



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No. 85-1563

IN THE SUPREME COURT
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UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,
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Respondent.

On Writ of Certiorari to the
California Supreme Court

BRIEF FOR THE CRIMINAL JUSTICE
LEGAL FOUNDATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether a jury instruction given during the sentencing phase of a death penalty trial not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling violates the Eighth Amendment to the United States Constitution where the state's death penalty statute and the jury instructions which explain its provisions require the trier of fact to consider any aspect of the defendant's character or record and any of the circumstances of the offense that might extenuate the gravity of the crime.

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I

THE TRIAL COURT DID NOT COMMIT CONSTITUTIONAL ERROR BY INSTRUCTING THE JURY NOT TO BE INFLUENCED BY SYMPATHY, PASSION, PUBLIC OPINION, ETC., IN LIGHT OF SUPPORTING INSTRUCTIONS WHICH INFORMED THEM OF THEIR DUTY TO CONSIDER ALL RELEVANT ASPECTS OF RESPONDENT'S CHARACTER AND THE CIRCUMSTANCES OF HIS CRIME.....	4
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BRIEF FOR THE CRIMINAL JUSTICE
LEGAL FOUNDATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

INTEREST OF THE CRIMINAL JUSTICE LEGAL
FOUNDATION

The Criminal Justice Legal Founda-
tion is a non-profit law firm organized
to advance the public's interest in a

system of criminal justice which accords full respect to their rights to the peaceful enjoyment of their lives, liberties and properties.

Interpretation of California's death penalty initiative, as well as all legislation concerning the imposition of the ultimate sanction, is a matter of the greatest concern. If there is to be a death penalty, as the California electorate and their representatives have demonstrated time and again over the past decade, care must be taken that it be interpreted and applied rationally and consistently. Misinterpretation can lead to an erroneous finding of a violation of the Eighth Amendment to the United States Constitution. Such a result would not meet the public interest in the existence of a death penalty.

CJLF's interest in the present case is premised on the public concern that a death penalty exist, and that its application be as free as possible from arbitrary factors.

SUMMARY OF ARGUMENT

During the past decade, this Court has emphatically urged the critical importance of a defense counsel's ability to personalize a capital defendant in a death penalty trial as a means of obtaining an alternative sanction to capital punishment in a given case. However, the concept of individualized sentencing must be viewed in light of the basic principle that unguided, arbitrary, and wanton jury discretion has no place in the sentencing process.

It is urged that an instruction that the sentencing jury "not be swayed

by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," does not violate the dictates of this Court's precedent when given with other admonishments which expressly and unambiguously instruct the sentencing body to consider any mitigating circumstance relating to the offense or the offender.

ARGUMENT

I

THE TRIAL COURT DID NOT COMMIT CONSTITUTIONAL ERROR BY INSTRUCTING THE JURY NOT TO BE INFLUENCED BY SYMPATHY, PASSION, PUBLIC OPINION, ETC., IN LIGHT OF SUPPORTING INSTRUCTIONS WHICH INFORMED THEM OF THEIR DUTY TO CONSIDER ALL RELEVANT ASPECTS OF RESPONDENT'S CHARACTER AND THE CIRCUMSTANCES OF HIS CRIME

A common doctrinal thread runs throughout the evolution of the Eighth Amendment process in the context of capital sentencing. Beginning with the seminal case of Furman v. Georgia 408

U.S. 238 (1972), invalidating then existing death penalty statutes, the plurality concerned itself primarily with the arbitrariness evident in the imposition of capital sentences. The Furman requirement of guided discretion was based on the need to purge arbitrariness and caprice from the capital sentencing decision and to establish a "meaningful basis for distinguishing the few cases in which ... [the death penalty] is imposed from the many cases in which it is not." (Id. at p. 313.) This demand for consistency and reliability has been a constant theme in death penalty litigation and literature. (Rudin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause, 126 U. Pa. L. Rev. 989, 995 (1978).) Furman's, basic message was clear - that guided capital

sentencing discretion was an Eighth Amendment requirement (408 U.S. at 257).

In Gregg v. Georgia 428 U.S. 153 (1976) Justice Stewart (writing for the plurality) reiterated Furman's principle that the death penalty must not be imposed in an arbitrary or capricious fashion. Instead "the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant" (Id. at p. 199, emphasis added). Accordingly, Gregg, identified four basic themes which would frame all subsequent capital sentencing adjudications: consistency, individualization, weighing of aggravating and mitigating circumstances, and appellate review of capital sentencing (Id. at pp. 188-95). By identifying these factors, the Gregg

plurality clarified the Eighth Amendment procedural rationale initiated in Furman.

In two other cases decided in 1976 this Court sought to guarantee not only objective but particularistic imposition of the death penalty by striking down a series of state death penalty statutes which mandated uniform application of the death penalty to all persons convicted of committing certain categories of murder (e.g., Roberts v. Louisiana 428 U.S. 325 (1976); Woodson v. North Carolina 428 U.S. 280 (1976)). Mandatory death penalty schemes were held violative of the Eighth Amendment's protection against the arbitrary imposition of capital punishment. In so holding, this Court effectively required states to develop approaches that provided for a structured exercise of dis-

cretion while still guaranteeing individualized sentencing (Gregg v. Georgia 428 U.S. 153, 195 (1976); Proffitt v. Florida 428 U.S. 242, 258 (1976); Jurek v. Texas 428 U.S. 262, 271 (1976)).

Interpreting Furman as seeking to reduce sentencer arbitrariness, rather than eliminating all sentencing discretion, Justice Stewart in Woodson v. North Carolina 428 U.S. 280 (1976) concluded that low visibility decision-making resulting from such mandatory provisions offended the Eighth and Fourteenth Amendments:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense ... treats persons convicted of a designated offense

not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

(Id. at p. 304; emphasis added.)

Accordingly, individual consideration of mitigating and aggravating circumstances was treated as a "constitutional imperative" (Id.), and the "fundamental respect for humanity" rationale was deemed an independent justification for requiring individualized capital sentencing procedures (Id.). In short, the Eighth Amendment requires as "constitutionally indispensable" a consideration of each individual offender's character and record as well as the circumstances surrounding his or her offense (Id.).

Lockett v. Ohio 438 U.S. 586 (1978), was an important step in the constitutionalization of death sentencing procedures. Once again, the primary concern was the attainment of "a greater degree of reliability when the death sentence is imposed" (Id. at p. 604). Specifically, the jury's consideration of the defendant's character and the particular circumstances of the crime was deemed necessary to assess the applicability of available corrective techniques and post conviction remedies:

The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. A variety of flexible techniques - probation, parole, work furloughs, to name

a few - and various postconviction remedies may be available to modify an initial sentence of confinement in non-capital cases. The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

(Id. at p. 605.)

Thus, a sentencing jury's consideration of any mitigating circumstance relevant to the character and record of the individual offender and the circumstances of the particular offense was held to be imperative to a guided, yet individualized sentencing procedure (Id. at pp. 601-604).

Godfrey v. Georgia 446 U.S. 420 (1980) reiterated the Eighth Amendment requirement of consistency and reliability by invalidating a death sentence imposed on the basis of a vague construction of a statutory aggravating circumstance. The death penalty provision in question was held unconstitutional as applied by the Georgia Supreme Court because the discretion permitted would condone the imposition of the death penalty based on caprice or emotion rather than reason (Id. at p. 433).

Analyzed together, Lockett, supra and Godfrey reaffirm the importance of an individualized sentencing procedure and define the parameters of the jury's discretion. When determining whether death is an appropriate penalty, the jury is thus provided with the oppor-

tunity to objectively assess every nuance of both the defendant's character and the circumstances surrounding his offense.

Finally, in Eddings v. Oklahoma 455 U.S. 104 (1982), a majority of the Court expanded the Eighth Amendment process rationale to require consideration of all relevant mitigating evidence. Implicit in its holding is the notion that a jury's decision-making function should not be guided by wholly irrelevant matter not bearing on the defendant or the circumstances of the offense; it was the sentencer's failure to consider all relevant evidence that was deemed reversible error (Id., at pp. 114-115). Thus, although Eddings, in effect, broadened the scope of mitigating factors that must be considered by the sentencing authority, it did not

sanction a decision-making process based on unfettered or untethered emotions unrelated to the facts and circumstances of the offense or the offender. As urged in Zant v. Stephens 462 U.S. 862 (1983), "... the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime (Id., at p. 878-879, emphasis added).

As Justice Marshall noted in Zant, supra:

If this Court's decisions concerning the death penalty establish anything, it is that a capital sentencing scheme based on "standardless jury discre-

tion" violates the Eighth and Fourteenth Amendments.

(462 U.S. at p. 905, Marshall J., dissenting.)

Furthermore,

As this Court's decisions establish, the focus of the sentencer's attention must be directed to specific factors whose existence or nonexistence can be determined with reasonable certainty.

(Id. at p. 917, Marshall, J., dissenting.)

Again, in California v. Ramos, 463 U.S. 992, 1021-1022 (1983), Justice Marshall noted:

Since any factor considered by the jury may be decisive in its decision to sentence the defendant to death ... the jury

clearly should not be permitted to consider just any factor. Rather, it should only be permitted to consider factors which can provide a principled basis for imposing a death sentence rather than a life sentence....

[T]he Constitution forbids the jury to consider any factor which bears no relation to the defendant's character or the nature of his crime, or which is unrelated to any penological objective that can justify imposition of the death penalty. Our cases establish that a capital sentencing proceeding should focus on the nature of the criminal act and the character of the offender The Court has thus stressed that the

appropriateness of the death penalty should depend on "relevant facets of the character and record of the individual offender The requirement that the jury focus on factors such as these is designed to ensure that the punishment will be 'tailored to [the defendant's] personal responsibility and moral guilt'."

(Id., Marshall, J., dissenting, emphasis original.)

As a result, a sentencing process that mandates or encourages a jury's reliance on mere sympathy, passion, prejudice, public opinion, or the like would constitute a departure from the kind of individualized focus required in capital sentencing. Likewise, a procedure which guards against the imposition

of a death sentence based upon a consideration of factors having absolutely no relation to the nature of the offense or the character of the individual is entitled to constitutional approbation where the sentencer is otherwise clearly informed of its constitutional duty to consider in mitigation all relevant aspects of the defendant's character and the circumstances of his crime.

A review of the sentencing scheme in effect at the time of Respondent Brown's trial, read in conjunction with the jury instructions reveals accord with the decisional authority discussed above.

The California death penalty statute applicable at Respondent's trial expressly permitted him at sentencing to offer evidence "as to any matter relevant to ... mitigation ... including,

but not limited to, the nature and circumstances of the present offense, ... and the defendant's character, background, history, mental condition and physical condition" (Cal. Pen. Code § 190.3). This same statute also provided:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true ...

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or

violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

(Id.)

At the sentencing phase of Respondent's trial, the jury was read CALJIC No. 8.84.1 (4th ed. 1979). This instruction closely paralleled the above quoted statutory language, clearly advising the trier of fact of its obligation to consider in mitigation all relevant aspects of Brown's character and the circumstances of his crime.

In construing subdivision (k) of CALJIC No. 8.84.1, the California Supreme Court in People v. Brown 40 Cal.3d 512, 537 (1985), expressed the fear that when read with the anti-sympathy warning, it would "divert the jury from its constitutional duty to

consider 'any [sympathetic] aspect of the defendant's character or record'..."¹ (Id.). It is respectfully submitted that such a construction is unreasonably narrow. The California Supreme Court's reasoning implies that jurors are without intelligence or common sense. A more reasonable reading leads to the conclusion that each juror is to consider any circumstance, whether relating to the offender or the offense.

As mentioned earlier, CALJIC 8.84.1 closely parallels the statutory language

1

Subdivision (k) advised the jury to consider "any ... circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (See also Cal. Pen. Code § 190.3 subd(k), supra.)

of Cal. Pen. Code § 190.3. In California v. Ramos 463 U.S. 992 (1983), this Court cited the very same provisions and noted:

[R]espondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of Lockett v. Ohio, 438 U. S. 586 ... The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in this case.

(California v. Ramos, supra at 1005, n. 19; See also, Pulley v. Harris 465 U.S. 37, 53 (1984), upholding § 190.3.)

Furthermore, CALJIC No. 8.84, held by the state supreme court to be uncon-

stitutional, is not inconsistent in any way with the aforementioned statutory provisions. More significantly, it did not advise the jury to ignore any relevant evidence or mitigating circumstance. Instead, it simply cautioned the jury not to be swayed by "mere sentiment, conjecture, sympathy"

Such an instruction should not be viewed in total isolation but rather in conjunction with the multitude of unambiguous instructions given at the same time. The net affect is to preclude the jury from wandering beyond the realm of relevancy and to focus their attention on the evidence and the reasonable inferences to be drawn therefrom. In this respect, it is consistent with Justice Steven's observation in Gardner v. Florida 430 U.S. 349, 358 (1977) that

"[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Id.)

In his dissenting opinion in People v. Bandhauer 1 Cal.3d 609, 619-620 (1970) [83 Cal. Rptr. 184, 463 P.2d 408], Justice Mosk recognized that in practical terms, such an instruction could only help capital defendants by reducing the possibility that sentencing juries will be swayed by sympathy for the victim, along with other adverse forms of "passion, prejudice, public opinion or public feeling":

Realistically viewed, the instruction ... is, on balance, favorable to the defendant. Of the various influences proscribed, "sentiment" is vague

and "conjecture" is neutral, but "passion, prejudice, public opinion or public feeling" are most often hostile to the defendant. I doubt, for example, that the majority would sanction an instruction which affirmatively authorized the jury to be governed by such "passion, prejudice, public opinion or public feeling." This leaves "sympathy" as the majority's main concern. But even that emotion, I submit is more likely to be evoked in favor of the innocent victim and his family than of the criminal whom the jury has convicted of the offense.

(Id.)

Mosk's concerns were reiterated in People v. Easley 34 Cal.3d 858 (1983)

[196 Cal. Rptr. 309, 671 P.2d 813] where he wrote:

In the current climate of public opinion, sympathy is more likely to be aroused for the victim and his family than for a defendant who has been found guilty of a brutal first degree murder. Thus cautioning a jury in the penalty phase of the trial not to be swayed by mere sympathy redounds to the benefit, not the detriment, of the defendant.

(Id. at 886.)

In essence, the "sympathy" admonishment, in addition to the mass of penalty phase instructions given at Brown's trial, effectively precluded the jury from considering factors that might have harmed him and thus avoided the sort of "freakish," and unguided

decision-making that Furman and its progeny sought to eliminate. "Sympathy ... is not a characteristic of the defendant; it is an emotion of the jurors. Thus, when jurors were cautioned not to be swayed by sympathy, they were not being instructed to ignore thoughtful and dispassionate consideration of the defendant's proffered mitigation. They were merely admonished to employ reason, not emotion. That is sound advice in a court of law. Justice Cardozo reminded us: 'The balance is swayed, not by gusts of fancy, but by reason.' (Cardozo, *Growth of the Law* (1924) p. 58.)

"...[I]f jurors are permitted - indeed, encouraged - to entertain emotion in assessing penalty, in most instances they are likely to order death for the miscreant." (People v. Lanphear

36 Cal.3d 163, 170 (1984) [203 Cal. Rptr. 122, 680 P.2d 1081] (Mosk, J., dissenting).)

Sister jurisdictions in accord include Nevius v. State 699 P.2d 1053 (Nev. 1985); People v. Del Vecchio 475 N.E.2d 840 (Ill. 1985).

CONCLUSION

This Court has repeatedly insisted that the sentencing decision be based on the facts and circumstances of the individual and his crime (Spaziano v. Florida 468 U.S. ____ (1984), [82 L.Ed.2d 340, 352, n. 7, 104 S.Ct. 3154, cases cited therein). In this regard it must be concluded that the sentencing instruction complained of by Respondent passes constitutional muster.

/

DATED: July 16, 1986.

Respectfully submitted,

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October Term, 1986

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PEOPLE OF THE STATE OF
CALIFORNIA,
Petitioner,

v.

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ALBERT GREENWOOD BROWN, JR.,
Respondent.

I, THE UNDERSIGNED, declare under penalty of perjury that the following is true and correct.

I am a citizen of the United States, over 18 years of age, not a party to the subject cause, and employed by the Criminal Justice Legal Foundation in which County the below stated mailing occurred. My business address being 310 J Street, Suite 310, Sacramento, California, 95814.

I have served the within BRIEF OF AMICUS CURIAE as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C., 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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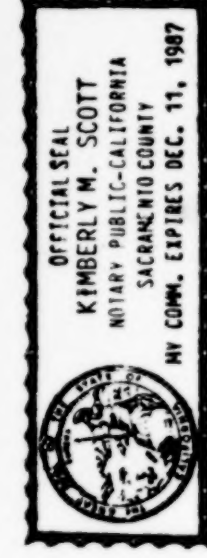
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DATED: July 16, 1986.



(NOTARY PUBLIC)

Notary Public in and for the State of California, City and County of Sacramento, personally appeared L. EVANGELINE ROBERTS, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

No. 85-1563

Supreme Court, U.S.

FILED

SEP 5 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1985

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Petitioner,

vs.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

On Writ of Certiorari To The Supreme
Court Of The State of California

**BRIEF FOR AMICI CURIAE
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California Jury Instructions Criminal (4th ed. 1982 & Supp. 1986) No. 1.00.....	
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INTEREST OF AMICI CURIAE¹

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the rights of criminal defendants. The ACLU opposes capital punishment, and works in a variety of forums, including litigation, public education, and legislative advocacy on behalf of people facing death sentences. The ACLU's of Northern and Southern California are the California affiliates of the ACLU.

SUMMARY OF ARGUMENT

This case presents the exceedingly narrow issue whether someone may be

¹ The parties' letters of consent to filing of this brief are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

sentenced to die by a jury that had been given two improper instructions: (1) not to be swayed by sympathy for the defendant in setting penalty; and (2) to consider mitigating circumstances which relate to the crime, but not instructed also to consider the character and record of the offender. This combination of instructions renders unconstitutional the resulting death sentence, as the California Supreme Court found.²

In its petition for certiorari, the State of California incorrectly implies that affirmance of the California Supreme Court would draw in question some

² The second instruction is "fairly included" in the question on which certiorari was granted, see Sup. Ct. R. 21.1(a); Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978); accord United States v. Mendenhall, 446 U.S. 544, 551-52 n.5 (1980), because of the close nexus between the two instructions. See pp. 23-45, 47-51 infra.

170 death sentences in that state and perhaps elsewhere. Pet. for Cert. 25, 26, 63.

To the contrary, the trial court in the present case used an unusual sentencing scheme involving the two instructions identified above. No other state has a similar system.

In fact, even in California the present case is something of an historical curiosity. The no-sympathy issue has been clear in California for many years. The drafters of the no-sympathy instruction specifically included a Use Note specifying that it "should not be used in the penalty phase of a capital case." California Jury Instructions - Criminal [CALJIC] §1.00 (4th ed. 1982 & Supp. 1986) (emphasis added). This Use Note has been part of the CALJIC instructions since 1970 (except for three

years between 1979 and 1982 when the Note was omitted for unknown reasons). See People v. Easley, 34 Cal.3d 858, 877 & n.5, 671 P.2d 813 (1983). Thus, very few California cases will be affected by the disposition of this one. The Court might wish to dismiss the writ as improvidently granted, given that affirmance of the California Supreme Court need not affect a significant number of cases in California or elsewhere.

In any event, the writ should be dismissed for lack of jurisdiction. The California Supreme Court's decision rests on at least two independent and adequate state grounds. The California court disapproved the no-sympathy instruction using its supervisory powers, and disapproved the jury instruction concerning nonstatutory mitigating

circumstances as a matter of state statutory construction. This Court therefore lacks jurisdiction.

Assuming arguendo that this Court were to reach the merits, the California Supreme Court should be affirmed.

First, the no-sympathy instruction violated the Eighth and Fourteenth Amendments. Sympathy, although not itself a mitigating circumstance, is the emotion triggered by compelling mitigating evidence. If jurors are told to squelch their feelings of sympathy, they will be unable to give appropriate weight to the mitigating evidence presented. The Georgia Supreme Court has so held; the unanimous Court of Appeals for the Eleventh Circuit, en banc, also did so in an analogous case.

Second, the instruction on nonstatutory mitigating circumstances

was unconstitutionally restrictive. The jury was told only to consider mitigating circumstances that extenuated "the gravity of the crime" (emphasis added). Nothing focused the jury's attention on aspects of Brown's character and record that might warrant a sentence other than death. This Court's cases, beginning with Lockett v. Ohio, 438 U.S. 586 (1978), and continuing through Skipper v. South Carolina, __ U.S. __, 54 U.S.L.W. 4403 (1986), require that sentencing juries consider precisely such evidence of character, record and propensities. The absence of such guidance "introduce[d] a level of uncertainty and unreliability into the ... process that cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643 (1980). The error was highly prejudicial because the defendant

here, as in Skipper, had introduced evidence suggesting inter alia that he would not be a future disciplinary problem if incarcerated for life rather than executed.

Finally, assuming arguendo that neither of the instructions by itself required reversal of the death sentence, the two taken together plainly did. The self-reinforcing instructions collectively obliged the jury to set the penalty without giving independent mitigating weight to the evidence proffered by the defense. Where, as here, there is substantial risk that the jury has set the penalty without fully considering such evidence, "Lockett compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Eddings v.

Oklahoma, 455 U.S. 104, 119 (1982)
(O'Connor, J., concurring) (citation
omitted).

ARGUMENT

I.

THE INSTRUCTIONS IMPERMISSIBLY PRECLUDED THE JURY FROM EXERCISING MERCY BASED ON SYMPATHY ENGENDERED BY MITIGATING EVIDENCE

The no-sympathy instruction was erroneous both as a matter of state and federal law. Because there is an independent and adequate state ground for the California court's decision, this Court should dismiss the writ for lack of jurisdiction. Sup. Ct. R. 16.1(b); Fox Film Corp. v. Muller, 296 U.S. 207, 211 (1935). Assuming arguendo that the Court nevertheless were to reach the merits, it should affirm the California Supreme Court. The Constitution requires that juries be free to spare the

lives of capital defendants based on feelings of sympathy engendered by mitigating evidence.

A. BECAUSE OF THE PRESENCE OF AN INDEPENDENT AND ADEQUATE STATE GROUND, THE COURT SHOULD DISMISS FOR LACK OF JURISDIC- TION.

In capital cases, like all others, states may provide defendants protections greater than those required by the U.S. Constitution. California v. Ramos, 463 U.S. 992, 1014-15 (1983). The Supreme Court of course may not review decisions of state courts that rest on such independent and adequate state grounds. Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

This is precisely such a case. The California Supreme Court -- relying on a series of state cases dating back to 1957 -- declared that the no-sympathy instruction was reversible error.

People v. Bandhauer, 1 Cal.3d 679, 618, 463 P.2d 408 (1970); People v. Polk, 63 Cal.2d 443, 451, 406 P.2d 641 (1965), cert. denied, 384 U.S. 1010 (1966); People v. Friend, 47 Cal.2d 749, 767-68, 306 P.2d 463 (1957). None of these decisions cited any federal constitutional authority as the basis for decision. For this reason, these cases must be based on the California Supreme Court's supervisory power over lower California courts.

In granting a stay in the present case, 54 U.S.L.W. 3787 (1986), Justice Rehnquist acknowledged the state-law nature of those decisions but expressed the view that they had become constitutionalized during the 1980s. Justice Rehnquist opined that, when the California court adhered to the Bandhauer-Polk-Friend rule when deciding new

cases in 1982 and 1983, and by finding at that time further support for the rule in U.S. Supreme Court cases, California had forfeited the independent state-law character of its rule. 54 U.S.L.W. at 3787, citing People v. Easley, 34 Cal.3d 858, 876, 671 P.2d 813 (1983), and People v. Robertson, 33 Cal.3d 21, 56-59, 655 P.2d 279 (1982).

Amici respectfully suggest that Justice Rehnquist's tentative views in Chambers (made, as they were, without the benefit of full briefing on the history of the no-sympathy instruction in California) should be reconsidered. This Court of course may review constitutional issues where "the [state] court felt compelled by what it understood to be federal constitutional considerations to construe ... its own [constitution] in the manner it did.'"

Delaware v. Prouse, 440 U.S. 648, 653 (1979), quoting Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). There certainly may be a federal constitutional question when a state court, in light of binding federal precedent, announces a new principle of state constitutional law to bring its law into conformity with the perceived federal constitutional mandate.

The present case, however, is precisely the opposite. California has prohibited no-sympathy instructions for almost 30 years. Recently, the California court in effect noted that federal law had come around to the same result. Even if the California court were wrong in its dictum concerning federal law, nothing in this or any other California case suggests an inclination to abandon the 30-year-old state

rule. Absent such an indication, this Court should respect California's long-standing rule and dismiss this case for lack of jurisdiction. To hold otherwise would establish the anomalous principle that, when a state believes federal law has caught up with preexisting state law, the state court jeopardizes the independent character of its rule by acknowledging the perceived change in federal law. Amici are aware of no case that so holds.³

For these reasons, the Court should dismiss the writ for lack of jurisdiction.

³ Nothing in Michigan v. Long, 463 U.S. 1032 (1983), requires a different result. In that case, the Court made clear that state courts normally should specify more clearly the independence of any ruling based on state law. That rule is not implicated here, however, given California's 30-year unbroken chain of state-law decisions condemning the no-sympathy instruction.

**B. IN ANY EVENT, THE NO-SYMPATHY
INSTRUCTION IS REVERSIBLE
CONSTITUTIONAL ERROR.**

It now is clear beyond cavil that a "sentencer must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant." Enmund v. Florida, 458 U.S. 782, 828 (1982) (O'Connor, J., concurring in the judgment).⁴ In particular, juries must consider "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. at 304 (plurality opinion), cited in California v. Ramos, 463 U.S. at 1001 n.13.

⁴ Although this opinion is denominated a "dissenting" opinion, 458 U.S. at 801, it reaches the same judgment as the majority, id. at 827 n.43.

Consistent with these principles, the California Supreme Court has condemned the no-sympathy instruction in the penalty phase of a capital case. This is a firm principle of California law, see supra pp. 9-13; it is an equally firm principle of federal law.

Sympathy, of course, is not by itself a mitigating circumstance; it is an emotion engendered by mitigating facts. In the penalty phase of a capital case, a jury makes a "moral assessment of those facts as they reflect on whether defendant should be put to death." People v. Haskett, 30 Cal.3d 841, 863, 640 P.2d 776 (1982) (per Mosk, J.). If the jury's moral assessment of the evidence in mitigation is sympathetic to the defendant in sufficient measure, that sympathy may "persuade the jury that death is not the appropriate

penalty." People v. Lanphear, 36 Cal.3d 163, 167, 680 P.2d 1081 (1984). Conversely, to instruct a jury to ignore sympathy is to instruct it to squelch precisely the moral assessment that mitigating evidence is intended to elicit.

The Court of Appeals for the Eleventh Circuit has reversed death sentences for just this reason. In Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc), cert. denied, 54 U.S.L.W. 3866 (1986), the prosecutor in a capital case had argued to the jury to have "no sympathy with that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for

a crime." Id. at 1458.⁵ He continued, "We have had too much of this mercy." Id. The en banc Court of Appeals, without dissent, vacated the death sentence. The prosecutor's argument "was fundamentally opposed to current death penalty jurisprudence," the court declared. Id. at 1460. "[T]he suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life." Id. (emphasis added).

⁵ In Drake, the prosecutor was quoting by name from an ancient opinion of the Georgia Supreme Court, see Eberhart v. State, 47 Ga. 598, 610 (1873), and the argument was improper in part for that reason. But in a later case, Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985), cert. denied, 54 U.S.L.W. 3777 (1986), the prosecutor had made the same arguments without attributing them to any court. The court of appeals vacated the death sentence in that case as well.

Similarly, the California Supreme Court correctly held that the Eighth and Fourteenth Amendments:

not only permit, but mandate freedom on the part of the jury to act on the basis of sympathy or compassion when that sympathy is a reaction to evidence regarding the defendant's character or background. That evidence, as distinguished from mitigating circumstances related to the offense itself, may not reduce culpability, but it must nonetheless be considered by the jury. It necessarily follows that the jury must be free to respond to it.

People v. Lanphear, 36 Cal.3d at 166 (emphasis added) (citations omitted).

The State's position apparently is that, if jurors are allowed to consider sympathy factors, the Court will have returned to the standardless decision-making that led to this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). Brief for Petitioner at 44-48. There are two responses.

First, this Court already has made clear that California sentencing juries receive substantial guidance. Pulley v. Harris, 465 U.S. 37, 51 (1984).

Second, nothing in the California sentencing system, as explicated by the California Supreme Court in this case, leaves the jury unconstitutionally at sea. California simply has made clear that feelings of sympathy, brought about within a juror by the mitigating evidence presented, are appropriate for jury consideration.

This Court's decisions support the conclusion of the California Supreme Court. This Court has "never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory ... factors." Barclay v. Florida, 463 U.S.

939, 950 (1983) (plurality opinion). In Barclay, a trial judge imposed a death sentence after concluding, based on his personal experiences in war and criminal law, that the murder was "shocking" even to someone "not easily shocked or moved by tragedy." Id. at 948 n.6. This Court affirmed the death sentence. Justice Rehnquist, for the plurality, concluded that the trial judge's visceral reaction to the facts of the case did not render it constitutionally suspect. Sentencers in capital cases should be "'free to consider a myriad of factors to determine whether death is the appropriate punishment,'" he declared. Id. at 950, quoting California v. Ramos, 463 U.S. at 1008. It is wholly permissible for the sentencer to consider subjective feelings and reactions in the process;

indeed, it would be improper for a state "to attempt to separate the sentencer's decision" from them. 463 U.S. at 950. In sum, "It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum" Id.

The State cannot have it both ways. If sentencers in passing judgment lawfully may take into account outrage engendered by the evidence in aggravation, the Constitution at a minimum requires that sentencers not be ordered to squelch feelings of sympathy engendered by the evidence in mitigation.

C. THE GEORGIA SUPREME COURT ALSO HAS EXPLICITLY CONDEMNED THE NO-SYMPATHY INSTRUCTION.

The State is incorrect in suggesting (pp. 60-62) that its position is supported by the weight of authority from other states. In Legare v. State,

250 Ga. 875, 302 S.E.2d 351 (1983), the Georgia Supreme Court considered and condemned a no-sympathy instruction virtually identical to the one at issue here. The jury in Legare had been instructed: "[T]he law does not permit jurors in arriving at their verdict to be governed by sympathy or prejudice. You may not and should not, therefore, render a verdict in this case upon sympathy for either party or prejudice against either party." 302 S.E.2d at 353-54. The Georgia Supreme Court held that this instruction was reversible error. "[T]he evidence in mitigation might well evoke sympathy," the court declared. Id. at 354 (emphasis added). "Because the charge complained of might well confuse the jury and limit their constitutionally required consideration

of evidence in mitigation, we hereby disapprove it." Id. (emphasis added).

In sum, contrary to the State's implication, the California Supreme Court is not alone in condemning the no-sympathy instruction.

II.

THE INSTRUCTIONS IMPERMISSIBLY PRECLUDED THE JURY FROM CONSIDERING NONSTATUTORY MITIGATING FACTORS PERTAINING TO THE DEFENDANT'S CHARACTER AND RECORD

Amici submit that the Georgia Supreme Court and California Supreme Court are correct: a no-sympathy instruction is federal constitutional error in all cases. Even if this Court were to believe otherwise, however, the death sentence still cannot stand. The sentence in any event was unconstitutional under this Court's decisions in Lockett, Eddings and Skipper, because the jury was improperly instructed on the role

of mitigating factors in its deliberations. Brown introduced substantial mitigating evidence demonstrating inter alia that, if his life were spared, he would not be a disciplinary risk in prison. See Skipper, __ U.S. __, 54 U.S.L.W. 4403, 4404 n.1 (1986). The instructions, however, precluded the jury from considering that evidence.

A. A CAPITAL DEFENDANT IS ENTITLED TO PROFFER, AND HAVE THE JURY CONSIDER, ALL RELEVANT EVIDENCE IN MITIGATION OF PUNISHMENT.

A fundamental precept of constitutional death penalty law is that a defendant may offer, and the jury must consider, all relevant evidence in mitigation of punishment.

Lockett v. Ohio, 438 U.S. 586 (1978), involved an Ohio statute that allowed the sentencer to consider only three enumerated mitigating circum-

stances. The Supreme Court held the statute unconstitutional and vacated the death sentence:

[T]he Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (some emphasis added) (plurality opinion of Burger, C.J.).

Eddings v. Oklahoma, 455 U.S. 104 (1982), carried the principle one step further. In Eddings, a capital defendant had been allowed to introduce evidence of his troubled family history, but the sentencer (the trial court) gave it no weight in mitigation of punishment. This Court vacated the death sentence, noting that the Eighth and Fourteenth Amendments require the factfinder to consider "the character and

record of the individual offender'" as "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" Id. at 112, quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976). In order to consider these factors meaningfully, the sentencer must have "'adequate information and guidance'"; this occurs only when the sentencer's "attention is focused on the characteristics of the person who committed the crime'" 455 U.S. at 111 n.6 (emphasis added), quoting Gregg v. Georgia, 428 U.S. 53, 197 (1976). The Court acknowledged that the Oklahoma statute at issue, unlike the Ohio statute in Lockett, did allow the defendant to present evidence "as to any mitigating circumstance." Okla. Stat. tit. 21, §701.10. The Court held, however, that mere introduction of evidence in mitiga-

tion is constitutionally insufficient when the sentencer does not understand its responsibility to consider that evidence. 455 U.S. at 113-15 & n.10.

Next, in Enmund v. Florida, 458 U.S. 782 (1982), the Court unanimously vacated the death sentence. Five justices held that the death penalty never could be imposed on one who did not personally take a life or intend to take a life. Id. at 1143-54. Significantly, the remaining four Justices (per O'Connor, J.), relying on Lockett and Eddings, concurred in the judgment. See note 4 supra. They noted that, "in deciding whether or not to impose capital punishment ... , a sentencer must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant." Id. at 1171 (emphasis added). In

Enmund's case, as in Eddings, the sentencer had been allowed to hear evidence in mitigation. Id. at 1172. That is insufficient, the four Justices declared, since the sentencer still had a "fundamental misunderstanding" of what it could do with the information. Id. at 1173. If the sentencer does not know how to "consider the mitigating circumstances proffered by the defendant," id. at 1172, the resulting death sentence cannot stand.

Recently, this Court further confirmed the capital defendant's right to have the sentencer consider all evidence in mitigation of his sentence. Skipper v. South Carolina, __ U.S. __, 54 U.S.L.W. 4403 (1986). In Skipper, the trial court excluded testimony that the defendant had conducted himself well during the seven and one-half months he

spent in jail between his arrest and trial. This Court⁶ held that, under Lockett and Eddings, the defendant had a right to proffer and have the jury consider evidence of his good behavior. 54 U.S.L.W. at 4403.

A primary precept of constitutional death penalty law thus is that the Eighth and Fourteenth Amendments not only authorize capital defendants to proffer, they require sentencing juries actually to consider, all relevant evidence in mitigation of punishment.

⁶ Skipper was a 6-3 decision. The split primarily resulted from the dissenters' view that "the defendant's behavior in prison following his arrest" was irrelevant. 54 U.S.L.W. at 4407 (Powell, J., dissenting) (emphasis added). Nothing in that dissenting opinion draws in question the fundamental validity of the Lockett-Eddings line of cases. Moreover, the evidence tendered in the present case focused on Brown's adaptability to future prison life, not on his pretrial incarceration.

B. CAPITAL SENTENCING PROCEDURES, ESPECIALLY JURY INSTRUCTIONS, MUST ENSURE THAT THE DECISION TO IMPOSE DEATH IS HIGHLY RELIABLE.

A second fundamental precept of modern death penalty law is that trial courts must use available procedural devices, such as jury instructions, to ensure accuracy and reliability in the decision to impose death. Because "there is a significant constitutional difference between the death penalty and lesser punishments," this Court has "invalidated procedural rules that tended to diminish the reliability of the sentencing determination." Beck v. Alabama, 447 U.S. 625, 637-38 (1980).

The constitutional requirement of reliability is a recurring theme in this Court's capital cases. As Justice O'Connor pointed out for the Court in California v. Ramos, 463 U.S. 992, 998-

99 (1983), "the qualitative difference of death from all other punishments requires the correspondingly greater degree of scrutiny of the capital sentencing determination." To be constitutional, court procedures must enhance, not diminish, the reliability of sentencing. Ford v. Wainwright, __ U.S. __, 54 U.S.L.W. 4799, 4802 (1986) ("fact finding procedures [must] aspire to a heightened standard of reliability"), citing Spaziano v. Florida, 468 U.S. 447, 456 (1984).⁷

Jury instructions are among the most important procedural safeguards available to courts to ensure sentencing

⁷ Many cases repeat the theme that courts must use available procedural safeguards to enhance the reliability of the decision to impose death. See, e.g., Caldwell v. Mississippi, 472 U.S. ___, 53 U.S.L.W. 4743 (1985); Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion); id. at 364 (White, J., concurring).

reliability. In Beck v. Alabama, 447 U.S. at 628-29, a state statute prevented the court from instructing the jury on lesser-included offenses to capital robbery-murder. The jury thus was "given the choice of either convicting the defendant of the capital crime ... or acquitting him." This Court reversed the conviction. It held that the trial court's failure to use the procedural device of complete jury instructions "inevitably ... enhance[d] the risk of an unwarranted" death sentence. Id. at 637. To so tip the balance toward death is to "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Id. at 643 (emphasis added).

C. THE TRIAL JUDGE THEREFORE WAS CONSTITUTIONALLY OBLIGATED TO INSTRUCT THE JURY ON BROWN'S THEORY OF MITIGATION.

From the first two precepts -- the rights to consideration of nonstatutory mitigation and to accurate instructions to ensure reliability -- flows a third: the trial court must specifically instruct the jury to consider evidence of a nonstatutory mitigating circumstance pertaining to the defendant's background, character and propensities. The jury instructions in this case failed to do so.

1. All defendants are entitled to instructions on their theory of the case.

Jury instructions on the applicable substantive law and defenses raised by the facts are fundamental even in noncapital cases. United States v. Grimes, 413 F.2d 1376, 1378 (7th Cir.

1969). See, e.g., Carter v. Kentucky, 450 U.S. 288, 302 (1981); Bird v. United States, 180 U.S. 356, 361 (1901); United States v. Hicks, 748 F.2d 854, 857-58 (4th Cir. 1984); United States v. Timberlake, 559 F.2d 1375, 1379 (5th Cir. 1977).

All defendants -- especially capital defendants -- are entitled to jury instructions pertinent to their theory of the case for at least three reasons:

First, the reference enables the jurors to remember more clearly the factors described in the instruction. Second, it describes the legal theory of the party that introduced the evidence and explains the way in which the evidence presented supports this theory. Third, the trial judge's explicit reference to the party's legal theory cloaks the theory in the authority and credibility of the judge.

Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consi-

deration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 347 (1981) (emphasis added).⁸

These principles apply with particular force in capital cases. In Williams v. United States, 131 F.2d 21 (D.C. Cir. 1942), the court said:

[O]f what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment? Just as a lawyer might be ignorant in a meeting of scientists, so may a juror be in his casual acquaintance with the law. The jury, a group of responsible citizens, is entitled to this legal instruction if it must accept the duty of passing upon the very life and death of a man.

Id. at 23 (emphasis added).

Eddings v. Oklahoma, 455 U.S. 104 (1982), illustrates the necessity of complete instructions on mitigating

⁸ See also Carter v. Kentucky, 450 U.S. at 302 n.20 (trial judge's "lightest word or intimation" is given great weight by jury).

circumstances. In that case, the defendant had been allowed to introduce mitigating evidence, but the record was unclear whether the sentencer had considered that evidence. The Court held that it is not enough that a defendant be allowed simply "to present evidence 'as to [a] mitigating circumstance.' Lockett [v. Ohio] requires the sentencer to listen." Id. at 115 n.10 (emphasis added).

In Eddings, the trial judge was the sentencer. Where a lay jury is the sentencer, the need for clear communication of fundamental sentencing principles plainly is even greater. See Gregg v. Georgia, 428 U.S. 153, 192 (1976) (plurality opinion) (When sentencing is by a jury, "the provision of relevant information under fair procedural rules is not alone sufficient to guarantee

that the information will be properly used in the imposition of punishment.").⁹

2. Brown presented highly relevant mitigating evidence in this case.

In the present case, Brown presented substantial mitigating evidence. The evidence showed that, if Brown were incarcerated for life, he would not be a disciplinary problem.

If a propensity for further crimes may be a factor in aggravation, see Jurek v. Texas, 428 U.S. 262 (1976), the absence of such a propensity must be a

⁹ "Without an itemized instruction, the average jury may be unable to extrapolate from the mass of mitigating evidence presented the mitigating circumstances that, in the defense's view, provided independent and sufficient ground for rejecting the death penalty. The uninstructed jury may be unable to consider the mitigating factors in the sense intended by Lockett." Hertz & Weisberg, supra pp. 34-35, at 345-46 (emphasis added).

relevant factor in mitigation. Skipper v. South Carolina, 54 U.S.L.W. 4403, 4404-05 (1986) (evidence that defendant would not pose a danger if not executed is highly relevant); California v. Ramos, 463 U.S. at 1003 (the jury lawfully may "assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to" live; jurors are entitled to predict what the defendant might do if not put to death).

That Brown would not be dangerous to prison staff and inmates; that he is not a generally violent person; that he does not have a lengthy prior record of violent crime; and that he is not likely to be a discipline risk in prison; all was highly relevant evidence for the jury to consider. Skipper, 54 U.S.L.W. at 4404-05. Similarly relevant was

evidence of Brown's broken home and basic good nature and values. E.g., Eddings, 455 U.S. at 113 & n.18 (defendant's family background is potentially mitigating evidence).

3. The actual jury instructions were constitutionally deficient because they excluded Brown's evidence from the jury's consideration.

As the California Supreme Court held, the trial judge should have explicitly instructed the jury that it could consider in mitigation, at a minimum, any "'aspect of [Brown's] character or record,' whether or not related to the offense for which he is on trial, in deciding the appropriate penalty." People v. Brown, 40 Cal.3d at 537, quoting Eddings, 455 U.S. at 113-

The instruction actually given failed to provide the necessary guidance. Besides requiring consideration of certain facts not relevant here, it merely allowed the jury to consider "[a]ny other circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime" (emphasis added). Such an instruction simply did not tell the jury how to consider the evidence, enumerated above, of nonstatutory mitigating circumstanc-

10 In denying the State's petition for rehearing the Court approved specific language for a new instruction to be used in future cases, 41 Cal.3d 439e, ___ P.2d ___ (1986).

11 The California Supreme Court's holding to this effect is yet another independent and adequate state-law basis for the decision under review. The court held that the jury must be given something more than the misleading instruction set forth above by construing the California statute. The court so held by "clarifying [the] statutory language," id., because the court believed a "prophylactic instructio[n]" was necessary to avoid "confusion," id. at 539 n.9 (emphasis added). Far from ruling that any aspect of the death penalty statute was unconstitutional, the court's construction "honors the plain language of section 190.3 ... explains the most likely 'constitutional' intent of the drafters and avoids the constitutional difficulties." Id. at 541, 545. As Justice Rehnquist indicated very recently, such "a state prophylactic rule," even one "designed to insure protection for a federal constitutional right," rests upon an independent and adequate state ground. Delaware v. Van Arsdall, 475 U.S. ___, 54 U.S.L.W. 4347 (1986).

FOOTNOTE 11 CONTINUED ON NEXT PAGE

Instead of dealing directly with this argument, the State simply asserts, without explanation or citation (e.g., pp. 26, 53), that the instructions did

FOOTNOTE 11 CONTINUED FROM PREVIOUS PAGE

This case thus is unlike Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984), or United Air Lines, Inc. v. Mahin, 440 U.S. 623 (1973). Those cases hold that a federal question survives for Supreme Court review where "a state court ... construe[s] state law narrowly" to avoid a conflict with the federal constitution. Three Affiliated Tribes, 467 U.S. at 138; accord United Air Lines, 440 U.S. at 630-32. In the present case, by contrast, the California Supreme Court did not hold that its statutory analysis was necessary to avoid unconstitutionality. The court merely required that a "prophylactic instruction," 40 Cal.3d at 539, of the kind Justice Rehnquist cited in Van Arsdall, be given (1) to eliminate juror confusion and (2) to avoid the need even to enter the sphere of constitutional adjudication.

ensure that "the jury will consider all relevant evidence relating to the offense and offender as mandated by this Court" (emphasis added).¹²

The State's position now is difficult to square with its district attorney's closing argument. Referring to this instruction, the prosecutor told the jury:

Finally, ... there is the factor of other circumstances which extenuate the gravity of the crime even though not a legal excuse. If present, it might mitigate, if absent there is no mitigation.

There is no evidence ... which extenuates the gravity of this crime

* * * *

... [N]o mitigation. No mitigation, no mitigation, no mitigation, no mitigation, no mitigation.

¹² The State interlards its brief with at least nineteen unsupported assertions that the jury considered "the offense and the offender" in setting penalty (emphasis added), as if by force of repetition to reshape the jury instruction that actually was given.

(J.A. 89-90, 94; emphasis added.)¹³

This combination of instructions and arguments frustrated Brown's theory of defense. Brown's primary hope of avoiding the death penalty was in persuading the jury to give weight to his mitigating evidence, such as the evidence that he would not be a disciplinary risk if his life were spared. Skipper, 54 U.S.L.W. at 4404 n.1. The judge, however, did not instruct the jury, even in the most general terms, that it could consider that

¹³ The prosecutor also dismissed Brown's evidence as "a blatant attempt by the defense to inject personal feelings in the case" (J.A. 91). He continued:

Hard as it is to say, ladies and gentlemen, the request that you heard to show mercy ... in this case have [sic] to be ignored and set aside. You have a duty beyond that and those appeals, ladies and gentlemen, would be ... inappropriate and improper to consider

(J.A. 92-93; emphasis added.)

evidence. In these circumstances, the death sentence cannot stand. Eddings v. Oklahoma, 455 U.S. at 119 ("we may not speculate as to whether the [sentencer] actually considered all of the mitigating factors"; "Lockett ... require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the [sentencer]").¹⁴

¹⁴ A contention by the State that any instructional error was harmless because defense counsel urged the jury to consider the mitigating evidence is simply wrong. "[A]rguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978); accord, e.g., Carter v. Kentucky, 450 U.S. 288, 304 (same). "Only an instruction from the trial court can invest a particular concept -- here the jury's ability to consider nonstatutory mitigating factors -- with the authority of the court." Washington v. Watkins, 655 F.2d 1346, 1375 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

III.

ASSUMING ARGUENDO THAT THE TWO INSTRUCTIONS WHEN CONSIDERED INDIVIDUALLY WERE NOT REVERSIBLE ERROR, TAKEN TOGETHER THEY REQUIRE A NEW PENALTY TRIAL

The combined effect of the no-sympathy and mitigating-circumstances instructions requires a new penalty trial. The California Supreme Court must be affirmed under its alternative holding, which is consistent with the position adopted by virtually all other states to consider the issue. Assuming arguendo that a no-sympathy instruction is not reversible constitutional error in all cases, at a minimum it is reversible where, as here, the accompanying instruction on mitigating circumstances is too limiting. Even the state supreme courts that have condoned no-sympathy instructions have done so only where there has been a broad, clear instruc-

tion in nonstatutory mitigating factors of the kind missing here.

The Nevada Supreme Court's decision in State v. Biondi, 699 P.2d 1062 (1985), is typical. In that case, as in the present one, the jury had been instructed not to "be influenced by sympathy, prejudice or public opinion." Id. at 1066 n.2. The Court found that this was not reversible error, but only in light of other instructions accompanying the disputed one. The jury in that case had been given an extremely clear instruction to consider any other circumstance it found to be mitigating. That instruction provided:

However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Biondi.... But you should not limit your consideration of miti-

gating circumstances to these specific factors. You may also consider any other circumstances relating to the case or to the defendant, Mr. Biondi, as reasons for not imposing the death sentence.

Id. (emphasis added).

In fact, the Nevada Supreme Court expressly has distinguished its jury instruction from the restrictive California instruction at issue here. Nevius v. State, 699 P.2d 1053, 1061 (Nev. 1985).

Other state supreme courts to consider no-sympathy instructions have reached results similar to those of the

Nevada Supreme Court.¹⁵ These decisions find the no-sympathy instruction

¹⁵ Illinois — People v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227, 1241 (1984), cert. denied, 86 L.Ed.2d 267 (no-sympathy instruction not erroneous where jury had been instructed to consider "any other facts or circumstances that provide reasons for imposing less than the death penalty"); accord People v. Perez, 108 Ill.2d 70, 483 N.E.2d 250, 260-261 (1985), cert. denied, 88 L.Ed.2d 93 (1985). But see People v. Wright, 111 Ill.2d 128, 490 N.E.2d 640, 654-55 (1985), petition for cert. filed, No. 85-6783 (affirming death sentence despite sentencer's confusion about relationship between sympathy and mitigating circumstances).

Louisiana — State v. Watson, 449 So.2d 1321, 1331-32 (1984), cert. denied, 83 L.Ed.2d 952 (1985) (no-sympathy instruction not erroneous where jury had been instructed to "consider any other relevant mitigating circumstances, not being limited to those defined," and that it was "free, even in the absence of any evidence in mitigation, to return a verdict of life imprisonment without benefit of parole"); accord State v. Brogdon, 457 So.2d 616, 629 (1984), cert. denied, 83 L.Ed.2d 862 (1985).

Ohio — State v. Jenkins, 15 Ohio St.3d 164, 473 N.E.2d 264, 288-90 (1984), cert. denied, 87 L.Ed.2d 643 (1985) (no-sympathy instruction not erroneous where jury had been instructed to consider "[a]ny other [mitigating] factors," including those that "in fairness and

FOOTNOTE CONTINUED ON NEXT PAGE

not to be reversible error, but generally only where accompanied by a broadly worded instruction on mitiga-

FOOTNOTE 15 CONTINUED FROM PREVIOUS PAGE

mercy" might lead to a lesser punishment than death); accord State v. Williams, 23 Ohio St.3d 16, 490 N.E.2d 906 (1986).

Oklahoma — Parks v. State, 651 P.2d 686, 693-94 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1155 (1983) (no-sympathy instruction not erroneous where jury had been instructed "not [to be] limited in their consideration to the minimum mitigating circumstances set out by the court, but [to] consider any other mitigating circumstances that they found [to] exist"); accord Brewer v. State, 650 P.2d 54 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1150 (1983).

South Carolina — State v. Chaffee, 328 S.E.2d 464, 470 (1984) (no-sympathy instruction not erroneous where it was given in lurid rape-murder trial after prosecutor's closing argument, and in response to defendant's objection that prosecutor was attempting to "inflame the passions of the jury" by provoking sympathy for the dead woman and her family). But see State v. Lucas, 285 S.C. 37, 328 S.E.2d 63, cert. denied, 86 L.Ed.2d 729 (1985) (affirming death sentence without elaboration, despite no-sympathy instruction).

ting circumstances.

Such an instruction of course was missing in the present case, and that omission is critical. "A crucial assumption underlying [the jury trial] system is that juries will follow the instructions given them by the trial judge." Parker v. Randolph, 442 U.S. 62, 73 (1979) (per Rehnquist, J). This Court therefore "presumes that jurors, conscious of the gravity of their tasks, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." Francis v. Franklin, 471 U.S. ___, 53 U.S.L.W. 4495, 4500 n.7 (1985).

In this case, however, the State urges reversal by assuming precisely the opposite. The State assumes (e.g.,

pp. 26, 53) that the jurors considered all the mitigating evidence despite an instruction to the contrary, and that (pp. 48-49) the jurors gave appropriate weight to the mitigating evidence despite an instruction prohibiting them from being moved by sympathy in their evaluation of that evidence.

These untenable conclusions could only be explained by jury deliberations something like the following:

JUROR NO. 3: Well, I don't think I want Brown to die. It's true he's a murderer, and the crime was awful. But the evidence in the penalty trial showed that he was basically a hardworking, good person; he had terrible psychological problems with women that led

to this rape/murder. The evidence is clear, though, he won't be a problem in prison if we spare his life. He has behaved well in prison in the past. I think I want him to live. I feel sorry for him.

JUROR NO. 5: Oh, no, you can't consider any of that. Remember, the judge and the D.A. told us that we couldn't consider sympathy in imposing sentence. We promised that in voir dire. And look here at the instructions; the judge also told us that we could only consider circumstances that "extenuate the gravity of the crime." You're just talking about sympathetic stuff about Brown

personally. That's not for us to consider.

JUROR NO. 1 [to Juror No. 5]: No, you're wrong about that. I agree that, read literally, that's what the instructions say. But I don't think that's what they mean. Recently, during my routine reading of United States Law Week, I noticed that the U.S. Supreme Court instructed juries to "consider, as a mitigating factor, any aspect of a defendant's character of record," not just the circumstances of the offense. So we are free to consider all that evidence, for what

it's worth, even though the instructions don't say so.

[THUS ENLIGHTENED, ALL JURORS
ACQUIESCE.]

The State's position assumes that something close to this ludicrous colloquy must have occurred. The law, however, requires more than this shaky assumption. Justice O'Connor made just that point in her concurring opinion in Eddings: "Although one can reasonably argue" that a sentencer confused about the law might have reached the same result if properly instructed, "Lockett compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" 455 U.S. at 119 (O'Connor, J., concurring), quoting

Lockett, 438 U.S. at 605; see Eddings, 455 U.S. at 115 n.10 (it is not enough that a defendant be allowed to introduce evidence in mitigation; "Lockett requires the sentencer to listen") (emphasis added).

Any test of juror misunderstanding is amply satisfied here. In the present case, the six transcript pages of penalty-phase jury instructions (R.T. 6558-64) contained at least the two errors discussed above. With self-reinforcing errors contained in such short instructions, there can be no contention here that the instructions on the whole properly described

the applicable law.¹⁶ This is not a case where an instructional error was ameliorated by repetitions of correct instructions elsewhere. Compare Francis v. Franklin, 53 U.S.L.W. at 4501 (Powell, J., dissenting) (no error where "trial court [elsewhere] repeatedly impressed upon the jury" the proper legal standard). To the contrary, in this case the harmful impact of each instructional error was aggravated by the other.-----

¹⁶ Recent cases, even those not involving death sentences, reaffirm this Court's consistent teaching. In Francis v. Franklin, 471 U.S. ___, 53 U.S.L.W. 4495 (1985), the question was whether an isolated jury instruction that arguably created a presumption adverse to the defendant violated the rule of Sandstrom v. Montana, 442 U.S. 510 (1979). The Court divided sharply in answering that question, but there was relatively little disagreement on the applicable test. According to the Court, the test is whether "'a reasonable juror could have understood the charge'" in an unconstitutional way. Id. at 4498 (emphasis added). Dissenting Justice Powell appeared to agree that this was the proper test. Id. at 4502.

CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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